(18,274)

SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM 1908.

No. [redacted]25

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY,
Appellant,

v.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON AND PHILLIPS INVESTMENT COMPANY,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEES.

ALEXANDER & THOMPSON,
MCLAURIN & WOZENCRAFT,
SPOONTS, THOMPSON & HARWISE,
ETHERIDGE & BAKER,
Solicitors For Appellees.

19,771

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INTRODUCTORY.

To present fairly the position of the parties to the record an outline must be given of the genesis and subsequent history of the controversy involved. This outline naturally divides itself into two parts: First, an action at law finally determined and the judgment discharged; and second, a suit in equity brought after the disposition of the law action to retry the same issues.

The essential facts in the controversy in the action at law and the suit in equity were identical, except that the bill in the latter case relates in part to incidents subsequent to the termination of the former action.

I.

THE LAW ACTION.

William A. Hunter, the assured under policies of life insurance aggregating $15,000 in favor of his sister, Mrs. Jennie M. Mettler, disappeared in December, 1896. The circumstances surrounding his disappearance indicated that he had been accidentally drowned in the Pecos river. No eye witness to the drowning was available. The insurance company having denied liability, because of its belief that Hunter was not dead, but had conspired with his sister to defraud it, Mrs. Mettler instituted an action upon the policies, relying upon circumstantial evidence, and upon her own testimony of innocence to meet the position of the company, and in July, 1900, she prevailed on a trial of said action in the Circuit Court of the United States, and recovered a judgment, which was by this Court affirmed, (Fidelity Mutual Life Association v. Mettler, 185 U. S., 308). Upon mandate being issued to the Circuit Court, and without waiting for the actual issuance of execution or the levy of same upon its property, if, indeed, it had any property within the jurisdiction of the Circuit Court for the Northern District of Texas, the Insurance Company on June 2, 1902, voluntarily paid into the registry of the Court the amount of the judgment against it, and costs of suit. Thereupon, by direction of Mrs. Mettler and her leading counsel, William H. Clark, said fund was distributed by the Clerk, as will be hereinafter described, and the law case was at an end.

II.

THE SUIT IN EQUITY.

In May, 1903, the Insurance Company having in the meantime changed its name to that indicated in the present record, filed a bill in equity in the Circuit Court of the United States for the Northern District of Texas against Mrs. Mettler, who, in the meantime, had become the wife of a Mr. Smythe, and against William H. Clark, Morris A. Spoonts, Charles A. Culberson, all of whom had been attorneys for Mrs. Smythe in the law case, and against the Phillips Investment Company, a creditor corporation of William H. Clark, which had received payment of a debt due it by said Clark out of his portion of the proceeds of the settlement by the Insurance Company of the judgment in the action at law. The object of the bill was to reclaim from the parties named the monies which had been paid by the insurance company in satisfaction of the law judgment, and, as preliminary to that relief, an injunction was sought, restraining the defendants named from setting up as a defense to the proceeding the judgment in the law action. The theory of the bill was that William A. Hunter was not in fact dead; that many of the circumstances tending to show that he had died at the time and under the circumstances shown in the law action were manufactured in pursuance of a conspiracy between Hunter and his sister, in order that she might collect his insurance money from the insurance company; and that the result was to give his disappearance a false color, and thereby enable Mrs. Smythe to prevail in the law action. *The attorneys in the case and the Phillips Investment Company, who are appellees in the present proceeding, were expressly exonerated from all guilty knowledge of or participation in the fraud of Mrs. Smythe, and they were sought to be held solely because they had received some of the monies paid on*

the judgment. On the hearing of this suit, the Circuit Judge awarded the Insurance Company the relief prayed against Mrs. Smythe, finding that Hunter was not dead, but living, and that Mrs. Smythe had conspired with him, as charged in the bill; but denied the relief prayed against the other respondents, acquitting them of all blame in the transactions under review. Being dissatisfied with that result, the insurance company prosecutes this appeal. It is to be noted that Complainant did not seek restitution from Mrs. Smythe of all the monies paid by it under the law judgment, but demanded of her simply that portion of the proceeds, which remained after her attorneys fees had been discharged, and its demand against the present appellees was in like manner restricted to the amounts which they had severally received. The bill, therefore, presented two distinct demands: One against Mrs. Smythe for monies fraudulently obtained; the other against the present respondents for monies honestly obtained, but alleged to be tainted by the circumstance that the judgment under which the funds were paid was obtained in part by the perjury of Mrs. Smythe.

THE DEVELOPMENT OF THE EQUITY SUIT.

The complainant has set out in its brief the bill of complaint as finally amended. The history of the steps taken to develop the bill to its final form is significant. The original bill of complaint was filed May 19, 1903. In that pleading, the complainant alleges in substance the issuance of the insurance policies upon the life of William A. Hunter, his disappearance, the belief indulged in by the pleader that the procurement of the policies and the disappearance of Hunter was the result of a conspiracy between Hunter and Mrs. Smythe to defraud it. It is alleged that upon Hunter's disappearance, Mrs. Smythe actively set about creating false appearances supporting the theory of his death by drowning, by causing

searches to be made, by pretending to discover accidentally the existence of the policies of complainant, by laboring studiously to manufacture a family repute of his death, and this, in the face of the knowledge, which complainant avers she possessed, that her brother was not dead, as was evidenced by her maintaining a regular correspondence with him during the pendency of the litigation; the case against Mrs. Smythe being summed up at page 6 of the Printed Record, in the conclusions of the pleader, as follows:

> "That she actively and diligently aided him in planning and carrying out said fraudulent scheme and concealing himself from the plaintiff, and that both by deliberate concealment and by direct perjury, she withheld from the Court the true facts as the same were known to her, and prevented the plaintiff from procuring evidence to sustain its defense."

Its excuses for not defeating the action at law consist of a reiteration of the conclusions theretofore advanced, to the effect, that, although the pleader was in the law action convinced that Hunter was living, yet its strenuous efforts for three years to secure credible evidence of such fact, were rendered abortive by the concealment and perjuries of Mrs. Smythe.

It is averred, however, that the pleader had secured additional proof of the fact that William A. Hunter survived his pretended disappearance, and that at the date of exhibiting said original bill, he was alive and confined in jail in Alabama upon a charge of swindling preferred against him by complainant, and that such fact, if it could have been proved in the law action would have offered a complete defense to that proceeding. That complainant did not discover "said fact" until ten months after the law judgment had been fully paid and discharged. It is not explained what is meant by the term "said fact." Evidently, it could not refer to his being confined in the Alabama jail, and with equal certainty, it may be

said, that it could not refer to the non-discovery by the plaintiff of the fact that Hunter was not drowned in the Pecos river, the entire bill showing that it had from the beginning adhered to the opinion that he was not so lost.

The bill, as against Mrs. Smythe, was plainly based upon the affirmative charge against her, that she had procured the law judgment by her own perjury, and by her corrupt use of manufactured evidences tending to show that her brother was dead. No claim is made in the bill, that Mrs. Smythe had done complainant any injury, except negatively, by concealing from it evidence, which, if produced, would have sustained its defense, and affirmatively, by production of her own perjured testimony.

As against the present respondents, no allegations of fraud or concealment or perjury were made, nor was the claim even made of any imputation of notice of Mrs. Smythe's fraud. It was charged simply, that she had employed as her attorneys William L. Hall and the law firm of Alexander, Clark & Thompson, and in consideration of their engagement to render professional services in prosecuting suit upon the insurance policies, she had assigned and transferred to them an interest in her claim to the extent of one-third of whatever might be recovered, plus $2,500, and such additional amount as might be allowed by the Court trying the cause, as attorneys' fees under the provisions of applicable Texas Statutes. It was alleged that afterwards William H. Clark, by written transfers, acquired the interests of his partners, Alexander & Thompson, and of William L. Hall, and that having in the meantime, under a right reserved in his contract of employment, to secure additional associate counsel, he had employed Morris A. Spoonts and Charles A. Culberson, who had rendered professional services in said litigation under such employment, and that further, the said Clark, being indebted to the Phillips Investment Company, has assigned to that respondent his entire

remaining interest in the judgment, as collateral security for his promissory note to it in the principal sum of $1,471.57, and it concludes with the recital, that these respondents severally pretend that they acquired their several interests in the law judgment for a valuable consideration paid in good faith and without notice, that William A. Hunter did not die, as alleged by Mrs. Smythe in the law action, and by way of a traverse of such alleged pretensions of these respondents, "charges the truth to be as follows:" proceding in such amendment to say, that complainant, in its defense of the law action, made its denial of the death of Hunter its leading defense, and by its pleadings therein filed had propounded such denial, and so had given notice of its rights and defenses to all persons dealing with said action or the matters therein litigated, and that these respondents, at the time of acquiring their respective interests in the premises, had actual knowledge of the contention made by the present complainant. It further charges that the respondents parted with no new or valuable considerations in obtaining the several payments made them, but accepted same in discharge of antecedent indebtedness. The additional averment was made, as against Mr. Culberson, that besides being advised, through complainant's pleadings in the law action, that Hunter had not died, as alleged, he further knew that said complaint was assigning as error in this court the refusal of the trial judge to direct a verdict in the law action in complainant's favor, upon the ground that no evidence had been adduced showing Hunter's death, and that on the contrary, the evidence adduced showed that in fact he was not dead; and that Culberson had, when he accepted his alleged assignment, actual notice of this plaintiff's rights and defenses. The amendment concludes with the averment that complainant had always denied the death of Hunter, as alleged in the law action, and had always availed itself of every legal method of enforcing such

denial, and that the several respondents took with knowledge and notice of such position of the present complainant.

The gist of the amendment was the charge that these respondents took, with imputed notice of the fact, that Hunter was not in fact dead and of Mrs. Smyth's fraud.

The demurrers being renewed by these respondents (Rec. 38-42), were by the Court overruled, as against the amended bill. This action must evidently have rested upon the attempt of the complainant to allege a case of constructive notice to these respondents of the fraud of their co-respondent Mrs. Smythe. We believe this action of the Honorable Circuit Court must have been the result of the repeated allegation by the complainant in the amendments to the bill by way of conclusion, that respondents took with notice of Mrs. Smythe's fraud. Such averment, while manifestly not justified by the facts detailed, must have influenced the Court to accord undue weight to the actual facts alleged. This belief is justified by the statement in the finding of the trial court, dismissing the bill as to these respondents, which will be hereinafter referred to.

The demurrers having been overruled, the respondents filed their several answers herein, after which the complainant again amended its original bill, by filing what it styles its second amendment (Rec. 73), elaborating its allegations, purporting to constitute the respondents Spoonts and Culberson assignees of the judgment in favor ofMrs. Smythe, and reiterating its averments of actual notice of the respondents of the several rights and defenses of the complainant as defendant in the law action. This last amendment, when analyzed, is found to add nothing to the allegations of facts constituting notice to the respondents, but abounds, as do its predecessors, with conclusions of the pleader, to the effect that the respondents had such actual and imputed notice of complainant's rights and defenses.

For a clear understanding of the position of the parties, it is proper to state in this connection, that after exhausting itself to make out a case against these respondents, in accordance with the theory of the amendments to its original bill of complaint, the complainant was driven to fall back upon substantially the same position taken by it when the trial court sustained demurrers to its original bill; and at p. 100 of its brief in this case it expressly confesses that fact in these words:

> "In all that they did relative to the prosecution of Mrs. Smythe's suit against the insurance company and in accepting compensation therefor, Messrs. Clark, Spoonts and Culberson were acting in entire good faith, believing that Hunter was dead, and that their client had a legitimate cause of action. The appellant never has alleged or attempted to prove anything to the contrary of this."

This declaration exonerates the Phillips Investment Company as well, who show their entire good faith, and moreover, whose rights being derived from Clark, are unimpeachable, if Mr. Clark's position is sustained.

ANSWER OF WILLIAM H. CLARK.

The answer filed by the respondent, William H. Clark, omiting the formal parts thereof, is as follows (Rec. p. 58):

II.

This defendant says that he is, and was, a stranger to all and singular the matters and things in the said plaintiff's bill of complaint set forth and contained in paragraphs numbered 2, 3 and 4, and is without knowledge or information as to the truth thereof, and therefore leaves the plaintiff to make such proof thereof as it shall be able to procure; without this, that this defendant denies all and all manner of fraud and unlawful combination, confederacy or conspiracy wherewith he is

charged, or sought to be charged, prejudicial or affected by allegation or imputation, implication, construction or otherwise, and says that he is wholly and particularly innocent and not guilty thereof.

III.

This defendant says that he is, and was, a stranger and without any information or knowledge as to any, all and singular, the matters and things, set forth in said bill of complaint, and the amendment thereto, occurring or existing prior to the time the said Fidelity Mutual Life Association of Philadelphia, declined to pay its said policies to said Jennie M. Mettler, on the ground that her proofs of death insufficiently showed the death of said William A. Hunter; and is and was in no wise a party to any and every pretended or supposed wrongful, fraudulent, speculative, commercial or improper motive, purpose, acting, combination or confederacy, heretofore or thereafter charged in said bill and the amendment thereto against him; that this defendant was wholly without notice giving him actual or constructive knowledge thereof, and therefore this defendant leaves the plaintiff to make such proof thereof as it may be able to produce, without this: That this defendant, on to-wit: October 27th, 1897, the time of his employment as attorney as aforesaid, was residing in Dallas, Dallas County, Texas, and was an attorney at law, profitably and exclusively engaged in the active practice and business of said profession, having practiced law in Dallas since 1885. That this defendant was wholly unacquainted with Jennie M. Mettler, and with the litigation and controversies between her and plaintiff herein, and the merits and facts of the case prior to his being solicited and requested to institute suit for her against said Fidelity Mutual Life Association upon its said policies.

That R. D. Gage, then and now an attorney at law and

banker, of Pecos City, Texas, of excellent and reputable standing, and a most — citizen, and personally and well and long known to this defendant as a gentleman of the highest integrity and superior intelligence and education, acting for and in behalf of the said Jennie M. Mettler, prior to the making of said power of attorney of October 27th, 1897, referred to by plaintiff,—informed and advised this defendant of the circumstantial evidence Mrs. Mettler had in support of her said claim—being substantially that introduced in evidence by her upon the subsequent trial of her said suit, and solicited and requested this defendant to institute suit for her against said association, at Dallas, Texas, assuring this defendant that he, the said Gage, believed that said William A. Hunter was drowned as averred by Mrs. Mettler; that he was acquainted with both of them, and that they were honorable, intelligent and respectable citizens, and that, in his opinion, the said Mrs. Mettler was urging her claim in good faith; and this defendant, believing in, and then and now having the utmost confidence in the good faith of the said Gage in any representations, statements and assurances made by him to this defendant in such a matter, this defendant accepted said employment from Mrs. Mettler, for and in the name of his said law firm, after consulting with his said partners, W. M. Alexander and W. L. Hall, in reference thereto, they agreeing with this defendant that the employment should be accepted; and thereupon said power of attorney of October 27th, 1897, was made.

That said R. D. Gage first suggested and advised that said suit be brought for Mrs. Mettler at Dallas, Texas, for the reason that said Fidelity Mutual Life Association of Philadelphia had no agent upon which service could be made in Reeves county, Texas, of which county said Pecos City was the county seat, preventing the institution of the suit at Mrs. Mettler's home, to-wit, at said Pecos City, Texas; and as she

had to bring the suit away from home, and as it would be adjudicated in the Federal court, on account of the Fidelity Mutual Life Association being a foreign corporation, he, the said Gage, advised and she, the said Mrs. Mettler, desired and decided to institute her said suit at Dallas, Texas, for the recovery of said policies, without being influenced so to do by this defendant or his said law partners.

IV.

This defendant says that it is true that on or about October 27th, 1897, Jennie M. Mettler employed said Alexander, Clark & Hall, to institute and prosecute her said suit against said Fidelity Mutual Life Association of Philadelphia upon said policies of insurance; and agreed to give them for their legal services a contingent fee of one-third of whatever sum might be recovered by suit or compromise; and thereafter, on, to-wit, October 27th, 1897, entered into a written power of attorney and contract of that date, embracing therein, among other things, said power of attorney and agreement. That thereafter, on or about June 10th, 1899, said law firm of Alexander, Clark & Hall, having been, by mutual consent, dissolved, and the firm of Alexander, Clark & Thompson formed, she entered into a like power of attorney and contract with Alexander, Clark & Thompson and W. L. Hall, in lieu of and in substitution of the former, the latter being the same as the former, except in this, it provided for the employment of associate counsel by her said attorneys, and gave to them in addition to said one-third of whatever might be recovered, the further contingent sum of $2500.00, and whatever statutory attorney's fees that might be recovered, out of which her said attorneys were to pay said associate counsel; and on, to-wit, said 10th day of June, 1899, entered into another written power of attorney and contract of that date, embracing therein, said power of attorney and new contract aforesaid, in lieu

of and in substitution of said former written power of attorney and contract.

Defendant avers that the said Mrs. Mettler was a widow, and poor and wholly unable and without the funds, and unable to procure the funds to pay her said attorneys a reasonable fee for their legal services to be rendered, otherwise than by a contingent fee out of whatever she might recover. That said first and second contracts were merely intended to provide for said employment and said contingent fee,—which was a very usual and proper contingent fee in cases such as hers, involving the contest of a close and doubtful case through the Supreme Court of the United States—the principal doubt being whether her testimony, said circumstantial evidence, was sufficient to establish her cause of action by a preponderance of the evidence; and this defendant expressly denies that he, or his said firms, speculated or traded in any manner whatsoever in or pertaining to said cause of action or said suit of said Jennie M. Mettler, or acquired any interest therein other than their said contingent fee; or that they or either of them, instigated, instituted or prosecuted said action for the common benefit of said Jennie M. Mettler and themselves, or either of them; but avers the truth to be that he and his said partners entered in said attorneys' contract, and instituted and prosecuted said suit in the exercise of his and their proper and lawful functions as attorneys at law, and in so doing acted in good faith, and for the honest purpose of protecting the interest of their client, the said Jennie M. Mettler, and not for any purpose of speculation or trade, as alleged by plaintiff. That, under and by virtue of the law in this State, as established by the Supreme Court of Texas, this defendant and his said partners were lawfully authorized to make said contract as attorneys for said contingent fee, without becoming parties to the suit or parties in interest, and without being held responsible for the duties and liabilities

resting upon their said client, the litigant; and are in nowise responsible or chargeable with the fraud of their client, if any, for that they merely entered into said contract of employment and obtained and treated said written attorneys' contracts as private and confidential papers between client and attorneys; and kept said attorneys' contracts with their private papers until the end of the litigation, and then filed the same in the court merely as evidence for the clerk of the court at Dallas, Texas, of authority from their client, who was absent at her father's home at Homer, Ohio, to collect and disburse for her the check given by the plaintiff to said clerk for her; and avers that all he did was strictly in line of his duty as attorney for the said Jennie M. Mettler, and that he is in nowise chargeable with or liable for her wrongful acts, if any.

V.

This defendant says that it is not true, as alleged in section 7½ on page 3 of the amendment to plaintiff's bill, that this defendant received his said fee of $8,346.00 solely by reason of and in pursuance of said two attorneys' contracts; but avers the truth to be, which plaintiff knew, or easily could have learned, that this defendant, in addition to giving Mrs. Mettler therefor his faithful and laborious professional services in said case for a period of about five years,—for which alone said fee would have been in nowise excessive, he also gave to said Alexander & Thompson for their interest in said contingent fee about $1100.00, on or about January 1st, 1900, prior to the rendition of said judgment in July, 1900; and gave said W. L. Hall about $900.00 for his interest therein, after the rendition of said judgment and before its affirmance by the United States Supreme Court.

That on or about January 1st, 1900, said firm of Alexander, Clark & Thompson was, by mutual consent, dissolved,

as aforesaid; and in an amicable, proper and just division of the business and fees of the firm, this defendant, who had been given said Mettler case in the division of the business, gave to said Alexander & Thompson, his one-third interest in certain fees in fire insurance cases of the firm, said fees being of the reasonable value of about $1100.00,—the business of the fire insurance companies owing said fees to said firm having gone to said Alexander & Thompson in said division of said partnership business.

That upon the dissolution of said firm of Alexander, Clark & Hall, on or about January 1st, 1899, said Hall retained his connection with said Mettler case and his interest in said contingent fee—and so retained the same until after the trial and the rendition of said judgment therein; and thereafter, in consideration of two certain lots owned by this defendant in South Dallas, and in consideration of being relieved of the preparation of said cause for trial in the Supreme Court of the United States, he gave this defendant his interest in said judgment. That in pursuance of this settlement this defendant afterwards conveyed said two lots to said Hall, the same being then of the reasonable value of about $900.00.

That, while it is true, as alleged on page 6 of plaintiff's bill, that said W. M. Alexander, William Thompson and W. L. Hall assigned and transferred in writing on May 29th, 1902, after the affirmance in said judgment, by endorsement thereon, all their interest in said contracts of employment of October 27th, 1897, and of June 10th, 1899,—such endorsements were then made for said consideration already received by them as aforesaid.

That this defendant in so purchasing said interest of his former partners in said contingent fee did not do so as a speculation or investment, but properly did so in order to have an adjustment and settlement of their partnership business, which was mutually desirable, their relationship as partners

having ceased. All of which this defendant did because of his confidence in the justness of said cause.

That this defendant so parted with his said years of professional services and with about $2000.00 in said fire insurance fees and said two lots without any fault on his part, and in an honest and faithful effort to do his duty in the due course of his professional work, to his client and his former partners.

This defendant says that it is not true, as alleged in plaintiff's bill on page 9, that the legal services of the defendant Morris A. Spoonts and Charles A. Culberson were rendered in consideration of this defendant assigning and transferring to the former an interest of $1500.00 and to the latter an interest of $1026.00 in this defendant's said attorney's contracts; but avers the truth to be, that in May, 1899, this defendant employed said Spoonts, as was necessary and proper, to assist him in the conduct of said suit, in the trial court, and in 1901 employed said Culberson to assist him in the conduct of said cause in the Supreme Court of the United States, and agreed to pay, and did pay, said Spoonts for the legal services so rendered by him said proper and reasonable fee of $1500.00, and agreed to pay, and did pay, said Culberson on account of the legal services so rendered by him, in part payment of such services, the sum of $500.00, and $26.00 for the printing of briefs at Washington, paid for by him—and in addition thereto, he, the said Culberson, was paid for his legal services, by the said Jennie M. Mettler, as she agreed to do at the time he was employed, the further sum of $500.00; that his said fee of $1000.00 was proper and reasonable compensation for the legal services so rendered by him. That in associating said Spoonts and said Culberson with him in said cause, as aforesaid, this defendant acted strictly in the line of his functions and duty as an attorney at law, and only did what is usual and proper under such circumstances.

VI.

This defendant says that said two contracts of said Jennie M. Mettler for a contingent fee, the first with Alexander, Clark & Hall, and the second with Alexander, Clark & Thompson and W. L. Hall, cannot, and never could be made the basis to constitute any claim for or against any one herein, for that the second contract undertook to deprive said Jennie M. Mettler of the power to compromise her said cause of action, and to end the litigation, and is therefore null and void; and the first contract was canceled and revoked and abandoned by the parties thereto before the rendition of said judgment.

VII.

This defendant says that the said judgment in favor of Mrs. Mettler and against the plaintiff, was rendered on the 4th day of July, 1900, for the sum of $21,550.00, with interest thereon at the rate of six per cent. per annum from and after said date, and costs of suit. That the amount of said judgment was made up as follows: $15,000.00 allowed as the face of said three policies, $2,250.00 allowed as legal interest on the policies, $1,800.00 allowed as statutory damages and $2,500.00 allowed as statutory attorneys' fees. That said cause was carried by said defendant to the Supreme Court of the United States, and heard at its October term, 1901, and on May 5th, 1902, the judgment of this court was affirmed by the Supreme Court.

That on, to-wit, June 3rd, 1902, the Fidelity Mutual Life Insurance Company, before said judgment had become collectable,—no mandate having been returned from the Supreme Court to the trial court, and not being returned until June 17th, 1902, and prior to the issuance of execution, and before execution could have issued,—did voluntarily pay to

J. H. Finks, the clerk of this court, for said Jennie M. Mettler, in satisfaction of her said judgment, principal and interest, to-wit, $24,028.25.

This defendant says that on said June 3rd, 1902, the Fidelity Mutual Life Insurance Company gave to J. H. Finks, clerk of this court, its check, payable to his order, on the Exchange National Bank of Dallas, for said sum of $24,028.25, in full satisfaction of said judgment, and said clerk endorsed said check and deposited it in the American National Bank, of Dallas, in his name, for the use and benefit of said Jennie M. Mettler, and in this way the bank became indebted to said Clark, for the use and benefit of said Jennie M. Mettler, in said sum. That on or about said 3rd day of June, 1902, said Jennie M. Mettler, then being at her father's home, at Homer, Ohio, by and through her duly authorized attorney, this defendant, William H. Clark, collected the said sum of $24,028.25 from said clerk, by his certain checks drawn on said American National Bank, in accordance with her order and request, by and through her said duly authorized attorney, acting under her instructions, as follows, to-wit: To said Jennie M. Mettler, through her attorney, William H. Clark, $11,616; to William H. Clark, $8,346.00; to Morris A. Spoonts, $1,500.00; to Charles A. Culberson, $1,026.00; and to the Phillips Investment Company, $1,540.25. That this settlement with the clerk was the equivalent of, and intended as, the paying by him to said Jennie M. Mettler of said $24,028.25, and she paying to the defendant Charles A. Culberson said $500.00; and to the defendant William H. Clark, $11,912.25, and his paying to the defendant Morris A. Spoonts $1,500.00 and to the defendant Phillips Investment Company $1,540.25, and to the defendant Culberson $526.00 in accordance with the lawful, just and fair understanding and agreement between the parties. That said checks were issued by the clerk directly to said parties, at the

request of the defendant William H. Clark, for the amounts due them respectively, in order to simplify the transaction.

That this defendant, acting as her attorney, under and by virtue of authority from her, the said Jennie M. Mettler, collected her said $11,616.00 check from the said American National Bank, and, upon instructions thereafter received from her, remitted same to her at Homer, Ohio, by New York exchange on the 23rd day of June, 1902; and collected his said $8,346.00 check from said American National Bank, and deposited the money in the National Bank of Commerce, of Dallas, to his account—and afterwards drew checks thereon, in favor of various and sundry creditors of his, to the full amount thereof and now has no part thereof, or any property, real, personal or mixed, into which, or on account of which the same was, or is, invested or spent—all of which he is ready to verify. That said other checks the clerk, properly and lawfully, as heretofore set out, delivered to the parties, or their duly authorized attorneys, and the same were paid in due course by the American National Bank. That the clerk's said check to the Phillips Investment Company was given at the request of this defendant, in satisfaction of this defendant's indebtedness to it, in the sum of said check. That in disbursing said $24,028.25 for said Jennie M. Mettler, according to her wishes and instructions, and in receiving said check for $8,246.00 and collecting same for himself, this defendant had no knowledge, information or suspicion that said W. A. Hunter was not in fact dead; nor that said suit was not brought and prosecuted in good faith for an honest demand, with an honest purpose and intent, upon lawful and just grounds, by said Jennie M. Mettler—if such be true in reference to her; nor that any fact alleged or proven, by or for said Jennie M. Mettler was false or fictitious, if such be true; nor of any facts or circumstances, reasonably calculated to arouse doubt or suspicion of the justness of her demand, other

than was produced at the trial of said cause, and shown by the record thereof on appeal, and known alike to the twelve jurors who rendered the verdict, and the judges of the Supreme Court who were of the opinion that the evidence sustained the verdict, and affirmed it; and this defendant has done nothing in the institution or prosecution of said action at law, or in disbursing, as aforesaid, the $24,028.25 paid by the plaintiff's check to the clerk for said Jennie M. Mettler, except what was clearly his right and duty as one of her legal representatives, and having acted in the due course of his professional business, he is not liable to the plaintiff, even should said Jennie M. Mettler be found guilty of the wrongs charged against her.

VIII.

That said Alexander, Clark & Hall, having full confidence in the sincerity and good faith of their client, the said Jennie M. Mettler, in the matter of her claim against said Fidelity Mutual Life Association of Philadelphia, at her instance and request, under and by virtue of their said employment as her attorneys, acting in due course of their professional duties and powers, did institute for her, on, to-wit, January 8th, 1898, her said suit against said Fidelity Mutual Life Association of Philadelphia, in the district court of Dallas county, for the 44th judicial district of Texas; and said suit was removed by the defendant therein to the circuit court of the United States for the northern district of Texas, at Dallas; but this defendant, nor none of said attorneys for Mrs. Mettler, attempted to push said suit to an early trial, but were all and each of them willing to continue the case by consent from term to term, in order to give the defendant any and all reasonable time in which to satisfy itself of the death of said William A. Hunter,—which said attorneys never doubted, and so advised the attorneys representing said Fidelity Mutual

Life Association in said suit,—all of which was done with the full knowledge and approval of the said Jennie M. Mettler; but the defendant, to the contrary, insisted upon and urged for an early trial of said suit, and opposed plaintiff's application for a continuance, and forced plaintiff to trial against her will, at the time of the trial and rendition of judgment in her favor.

IX.

This defendant says that he had no notice which gave him actual, implied or constructive knowledge that said W. A. Hunter was not dead; that this defendant is informed & believes & so avers that the plaintiff, upon receiving notice of the death of W. A. Hunter from Mrs. Mettler, sent its duly authorized agent and representative R. C. Milliken, to said Pecos city, Texas, in January, 1897,—who, upon arriving there, with her permission, undertook for her the preparing and having made and executed the affidavits of the proofs of death, and did obtain many such affidavits of the proofs of death, which he stated to Mrs. Mettler were satisfactory and sufficient—and yet, on or about the next day did return to see her, and stated in substance that he considered it his duty to tell her, before leaving, that he was satisfied the said W. A. Hunter, her brother, was not dead; and before leaving Pecos city he caused a telegram to be sent him at Pecos city, from the State office of the plaintiff, at Dallas Texas, to the effect that her said brother had been arrested and was then being brought to Pecos city, and showed said telegram to her, and threatened to send her and her brother to the penitentiary unless she would cancel and surrender said policies to him, in which event he promised that neither she nor her brother would be prosecuted, and that he would have her brother released from arrest. That while this defendant was informed of and had notice of this, the first claim of the plaintiff that

said Hunter was not dead, before the institution of said Mettler case, and that soon after the departure of said Milliken from Pecos city the plaintiff herein, by the letter of its president from its home office in Philadelphia, wrote Mrs. Mettler refusing to pay the policies, on the ground that plaintiff did not believe that her brother was dead; and while plaintiff did reiterate this as the reason why it should not be required to pay said policies in the court proceedings in said Mettler case, —yet, its conduct had been such as to cause this defendant to have no confidence in its good faith therein; and this defendant had no reason or cause whatever to doubt the good faith of Mrs. Mettler; and this defendant thought that plaintiff refused to pay said policies because it believed that the circumstantial evidence which Mrs. Mettler had to establish the death of her brother, the same as disclosed by said affidavits and proofs of death prepared by said Milliken, and the same as was introduced in evidence upon the trial of said Mettler case,—was insufficient evidence to support a verdict in her favor, rather than it believed said Hunter had not been drowned and was not in fact dead. And this defendant says he did know that said fact was a material issue in said suit, tried, contested and decided in favor of said Jennie M. Mettler and against plaintiff herein, upon sufficient proof, circumstance- and other facts; and that, by a verdict of the jury upon said issue and by the approval thereof and judgment thereon by this court in said cause, the fact that said W. A. Hunter was then dead, and was before the filing of said action at law,—was legally proven and established by competent evidence in the mode and manner recognized and provided by law; and the court having full jurisdiction, all further doubt, dispute, controversy and contention as to that fact and as to the liability of the plaintiff to pay to said Jennie M. Mettler the amount so found and adjudicated, were forever ended and solemnly adjudicated, and in all things finally af-

firmed by the Supreme Court of the United States; and thereafter by plaintiff herein recognized and observed; and knowingly and intentionally paying by its check, to the clerk of said court, for said Jennie M. Mettler, or her order, the amount so adjudged to be recovered by her, the validity and justness of said finding, verdict and judgment was no longer questioned, denied or disputed by plaintiff herein, nor open to such dispute; and was acquiesced in by plaintiff by its voluntarily, on, to-wit, June 3rd, 1902, before the return of the mandate from the Supreme Court of the United States to this court, on June 17th, 1902, and before execution issued or could have issued, on said judgment, paying off and satisfying said judgment as aforesaid; and not until about one year after this defendant had received in the manner heretofore stated, relying upon the validity of said judgment, said $8,346.00, and had expended said money so collected by him in due course of business, did plaintiff intimate or assert that said W. A. Hunter was not in fact dead, or that said judgment or its payment was wrongfully or fraudulently obtained and not acquiesced in by it. This defendant says that said verdict of the jury and said judgment determining said issue cannot now be annulled or set aside, nor said issue of law or fact be again tried, retried or re-contested in this court, as plaintiff is attempting to do herein: and that plaintiff is now estopped from denying the validity of said judgment; and that its remedy, if any it has, is against those persons guilty of such fraud or wrong, if there be such persons, and not this defendant; and that no trust or duty to account or restore said money to plaintiff in this suit exists or can be imposed upon this defendant,—an innocent taker, in good faith, for value, in due course of his professional business, from the hand of said clerk, acting for said Jennie M. Mettler, without notice of any fraud or wrong done or intended toward plaintiff, or any equity in plaintiff herein, and after solemn adjudication of said controverted issues and facts.

X.

This defendant says that he is, and was, a stranger to and without knowledge of the supposed conspiracy and fraud between said Jennie M. Mettler and said W. A. Hunter,—and therefore leaves plaintiff to make such proof in regard thereto as it may be able to produce; and this defendant says that, as to the written contracts between said Jennie M. Mettler and Alexander, Clark & Hall, Clark & Hall, and Alexander, Clark & Thompson and W. L. Hall, if it be held that said contracts are and were valid, existing contracts,—in this event, defendant says that both of said contracts have long since been performed; and that said attorneys at law, and each of them, in good faith and without intention, purpose or knowledge of any wrong or fraud toward plaintiff herein, in due course of their professional function, became and were innocent purchasers for value of said interest in said policies or judgment, or money; and without intention of any fraud, deceit or wrong contemplated, done or intended toward plaintiff, if there was in fact such by said W. A. Hunter and Jennie M. Mettler, or either of them,—which is not admitted but denied; and without any knowledge that W. A. Hunter was not in fact dead, or that any of the allegations, issues or testimony on the trial of said cause were false or fictitious. And this defendant says that the assignment of an interest in said policies judgment and recovery, for and upon consideration of the contractual undertaking of said attorneys to render and perform in the future certain necessary legal services for the recovery and collection of said policies,—and which services so undertaken, said attorneys were bound to and did render in payment for said property interest, in good faith and without notice of any wrong intended or done plaintiff,—constituted such attorney or attorneys and each of them innocent purchasers for value, in good faith, without notice of any equity of

plaintiff and created in this defendant an equity and title in and to the money so received by him, superior in all things to the pretended equity of the plaintiff; and this defendant in taking payment of his own demand from said Jennie M. Mettler, in the manner heretofore stated, took it free from any taint of wrong or equity of the plaintiff and by a right and title in all things superior thereto.

XI.

And this defendant denies all and all manner of unlawful combination and confederacy, or knowledge, implied or actual, thereof, wherewith he is by the said bill and amendment thereto charged, or that is sought to be established to his prejudice, without this—that there is no other matter, cause or thing in said plaintiff's said bill and amendment thereto contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant,—all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court may direct; and humbly prays to be hence dismissed with his reasonable cost and charges in this behalf most wrongfully sustained.

WILLIAM H. CLARK, Defendant.

McLAUREN & WOZENCRAFT,
Solicitors for Defendant, William H. Clark.

ANSWER OF MORRIS A. SPOONTS.

The answer of respondent, Morris A. Spoonts, omitting the formal parts, is as follows, (Rec. p. 47):

II.

This defendant says that he is and was a stranger to all

and singular the matters and things in the said plaintiff's bill of complaint set forth and contained in paragraphs numbered 2, 3 and 4, and is without knowledge or information as to the truth thereof, and therefore leaves the plaintiff to make such proof thereof as it shall be able to procure; without this, that this defendant denies all and all manner of fraud and unlawful combination and confederacy wherewith he is charged, or sought to be charged, prejudiced or affected by implications, imputation, construction or otherwise, and says that he is wholly and particularly innocent and not guilty thereof.

III.

This defendant says that he is and was a stranger and without knowledge or information as to all and singular the matters and things set forth in said bill of complaint, occurring or existing prior to, to-wit: May 1, 1899, and to any and every supposed wrongful, fraudulent or improper motive, purpose, acting combination or conspiracy charged in said bill, and therefore leaves plaintiff to make such proof as it may be able to produce without this;

That this defendant, on to-wit: May 1st, 1899, was residing in Fort Worth, Tarrant county, Texas, and was an attorney at law profitably engaged in the active business and practice of said profession, and wholly unacquainted with said Jennie M. Mettler and with the litigation and controversies between her and plaintiff herein, and the merits and facts of the case. That on or about May 1st, 1899, he was in due course of his professional business at attorney at law, consulted and employed by Wm. H. Clarke, one of the defendants herein, to assist him, the said Clarke, in the presentation and trial before said circuit court, of said action at law, then depending, brought by said Jennie M. Mettler against plaintiff herein to recover on said policies, and so in general way, and from an inspection of the pleadings and testimony in

said case, became informed of the issues of law and fact to be so presented and tried in said action and court, and that the right of Jennie M. Mettler to recover was independent upon proving indirectly by facts and circumstances the death of W. A. Hunter prior to the filing of said suit, there being no person having nor claiming to have personal knowledge of his death, which fact of death was disputed and denied by plaintiff herein, then in that action defending. That Wm. H. Clarke was a reputable person and an attorney at law of good professional ability, character and long and honorable standing. That it is and was not unusual, in the practice of the profession, for an attorney at law to consult with and employ some other attorney at law to assist him in the presentation and trial of important cases, nor for such attorney, when so consulted and employed, to appear and represent professionally the client of the attorney so employing him without objection; and this defendant, so employed by said Clarke, did assist him in the trial of said action at law and in the presentation thereof to the court and jury, in consideration of which professional services by this defendant so rendered at the instance and request and for the benefit of said Clarke; he charged and said Clarke paid to this defendant therefor the reasonable sum of fifteen hundred ($1,500.00) dollars; that as a means of making such payment, and in discharge of the personal obligation of said Clarke so to do, and for no other purpose, said Clarke requested the clerk of said court wherein said suit was presented and tried, and services and judgment rendered, to pay to this defendant said sum, which payment said clerk did make by means of his personal check or draft upon the American National Bank of Dallas, about June 3rd, 1902, in favor of this defendant, or order for said sum, which check or draft was not presented for payment nor collected by this defendant, but was by this defendant in due course

and usage of commercial business indorsed in blank and sold and delivered to the Fort Worth National Bank, of Fort Worth, Texas, who was then and there lawfully engaged in such banking business, and became the owner thereof, and the amount thereof was by it placed to the credit of this defendant as a money deposit in said bank, subject to be and was checked out by this defendant and his check paid by said bank in due course of such business. That during all said time and transactions there was no contract relations express nor implied existing between this defendant and said Jennie M. Mettler, plaintiff in said action at law, and no confidential fiduciary or other relation existing between them, and this defendant had no other or further relation or connection with said action at law, nor with the facts nor matters in controversy, than said professional assistance and service so rendered for said Clark, and had no knowledge, information, belief nor suspicion that said W. A. Hunter was not in fact dead, nor that said action at law was not brought and prosecuted in good faith for an honest demand, with an honest purpose and intent, upon lawful and just grounds; nor that any fact, alleged or proven, by or for said Jennie M. Mettler, in said action at law was false or fictitious, nor that any witness or testimony in her behalf was perjured, false or untrue, nor of any facts or circumstances, reasonably calculated to arouse doubt or suspicion of the justness of her demands, nor other than was produced at the trial of said cause and then equally known to plaintiff herein. That whether the fifteen hundred ($1,500.00) dollars alleged to have been paid to this defendant was in fact ultimately or actually paid from money of plaintiff herein, provided for the purpose, this defendant had and has no knowledge nor information except from the allegations of plaintiff's bill, and therefore leaves plaintiff to make such proof as it may be able to produce as to that fact.

IV.

This defendant says that if it be true, as alleged by plaintiff, that it deposited with the clerk of the court, in which said action at law was tried and judgment rendered, money sufficient and with the purpose and direction to pay and satisfy in full said judgment and costs in favor of Jennie M. Mettler, and that said judgment was wrongfully obtained and that fifteen hundred ($1,500.00) dollars of said deposited money was paid by said clerk to or by direction of Wm. H. Clarke or Jennie M. Mettler to or for the benefit of this defendant, nevertheless, said judgment was a record contract obligation of the highest dignity, as evidenced, importing verity and binding upon plaintiff herein until annulled by payment or judicial action; that plaintiff herein paid and performed said judgment obligation in money and intended so to do; and the clerk of said court and said Jennie M. Mettler and said Wm. H. Clarke, having received said money as payment, and having paid it out as current money and lawful medium of exchange in payment or discharge of their several obligations and duties, and by direction and consent of plaintiff, the legal title to said money vested in those to whom it was so paid in due course of business dealing, who took it without notice of the wrong or fraud perpetrated on plaintiff, if any there was perpetrated, which is not admitted, and such innocent takers of the legal title and possession, including this defendant, cannot in equity nor good conscience be required to refund said money, nor to account to plaintiff therefor in this suit.

V.

This defendant says that he is not, and was not, as alleged or implied in plaintiff's bill, an assignee of said policies or judgment or contract, nor of any part thereof, nor of all or

any part of any claim or demand or chose in action or contract right or contingent interest in them, nor of any recovery, and while he may have believed that Wm. H. Clarke had an interest in the said policies or judgment or proceeds thereof, when collected, and that said Clarke was paying or intending to pay his said obligations to this defendant from the proceeds of the payment of said judgment, this defendant took it from and as the money of Clarke, in payment of the debt obligation of Clarke for legal service of that value rendered by this defendant to said Clarke, and released Clarke from all and further obligations in due course of business and not as a payment of said judgment or any part thereof or interest therein, and this defendant says that plaintiff intended to discharge its apparent legal duty and obligation to Jennie M. Mettler, and to satisfy said judgment by payment with money, and that the same should be current money free from all equities and further control of plaintiff.

VI.

This defendant says that he did have notice that plaintiff herein as defendant in said action at law, denied that said W. A. Hunter was dead, and that said fact was a material issue in said action at law, tried, contested and decided in favor of said Jennie M. Mettler and against plaintiff herein upon sufficient proof of circumstances and other facts, and that a verdict of the jury upon said issue and by the approval thereof and judgment thereon by said court in said action at law, the fact that said W. A. Hunter was then dead and was before the filing of said action at law, was legally proven and established by competent evidence in the mode and manner recognized and provided by law in that court having full jurisdiction, and all further doubts, disputes, controversy and contention as to that fact and as to the liability of this plaintiff to pay to said Jennie M. Mettler in current money the

amount so there found and adjudged was forever ended and solemnly adjudicated, and in all things finally affirmed by the Supreme Court of the United States, and afterwards by plaintiff herein recognized, observed, obeyed and knowingly and intentionally paid in money to said Jennie M. Mettler or her order, the amount of money so adjudged to be recovered by her. That the validity and justness of said finding, verdict and judgment was no longer questioned, denied nor disputed by plaintiff herein, nor open to such dispute, and not until long after this defendant had received from said Clarke payment for said professional services at the time and manner above set forth and had expended the same in due course of business after plaintiff claim, intimate or assert that W. A. Hunter was not, in fact, dead, nor the said judgment or its payment was wrongfully or fraudulently obtained. This defendant says that said verdict of the jury and said judgment determining said issue, cannot now be annulled nor set aside, nor said issues of law or fact again tried, retried or contested in this court, and that plaintiff's remedy, if any it has, is full and adequate at law in damages for the wrong done it, if any was in fact done, in obtaining said judgment and payment against those persons guilty of such fraud or wrong, and that no trust or duty to account or restore said money to plaintiff in this suit exists or can be imposed upon this defendant an innocent taker in good faith for value in due course of business from the hand of said Clarke without notice of any fraud or wrong done or intended toward plaintiff, or in any equity of plaintiff therein, and after solemn adjudication of said controverted issues and facts.

VII.

This defendant says that he is and was a stranger to and without knowlelge or information of the supposed contracts and dealings between Jennie M. Mettler and Alexander, Clarke

and Hall, and between said Alexander and Clarke, and between said Hall and Clarke, and between Jennie M. Mettler and Clarke, and between plaintiff and W. A. Hunter, and therefore leaves plaintiff to make such proof in regard thereto as it may be able to produce; without this, that if it be true that such supposed contract exists, and existed at the alleged dates thereof, this defendant believes, and has reason to believe, that the same have all been fully performed, and that said Clarke and Alexander and Hall, acted as attorneys at law in good faith and without intention, purpose or notice of any wrong or fraud toward the plaintiff herein, and that said Clarke became and was an innocent purchaser for value and good faith of such interest in said policies or judgment or money, and without notice or intention of any fraud, deceit or wrong contemplated, done or intended toward plaintiff, if any there was in fact by said W. A. Hunter and Jennie M. Mettler or either of them which is not admitted but denied, and without any knowledge, notice or information that W. A. Hunter was not in fact dead, or that any of the allegations, issues or testimony in the trial of said action at law were false or fictitious.

This defendant says, from information derived from the allegations of plaintiff's bill, that the assignment of an interest in said policies, judgment and recovery for and upon the consideration of the contractual undertaking of said attorney, or attorneys, to render and perform in the future certain necessary and legal professional services in the recovery and collection of said money judgment, and which service so undertaken said attorneys were bound to, and did render in payment for such property interest in good faith, without notice of any wrong intended or done plaintiff, constituted such attorney or attorneys, an innocent purchaser for value in good faith, without notice of any equity of plaintiff, and created in said Wm. H. Clarke an equity and title in and to the

money so recovered and paid, superior in all things to the pretended equity of plaintiff, and this defendant, in taking payment of his own demand from said Clarke, took it free from any taint of wrong or equity of plaintiff, and by a right and title in all things superior.

VIII.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, or that is sought to be established to his prejudice without this, that there is any other matter, cause or thing in said plaintiff's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant. All of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court may direct, and humbly prays to be hence dismissed with his reasonable cost and charges in this behalf most wrongfully sustained.

MORRIS A. SPOONTS, Defendant.

STANLEY, SPOONTS & THOMPSON,
Solicitors for said Defendant.

ANSWER OF SENATOR CULBERSON.

The answer of respondent, Senator Culberson, omitting the formal parts, is as follows, (Rec. p. 69):

II.

This defendant says that he is and was a stranger to all and singular the matters and things in the said plaintiff's bill of complaint set forth and contained in paragraphs numbered 2, 3 and 4, and is without knowledge or information as to the

truth thereof, and therefore leaves the plaintiff to make such proof thereof as it shall be able to procure; without this, that this defendant denies all and all manner of fraud and unlawful combination and confederacy wherewith he is charged, or sought to be charged, prejudiced or affected by implications, imputation, construction or otherwise, and says that he is wholly and particularly innocent and not guilty thereof.

III.

This defendant says that he is and was a stranger and without knowledge or information as to all and singular the matters and things set forth in said bill of complaint occurring or existing prior to the 30th day of December, A. D. 1901, and to any and every supposed wrongful, fraudulent or improper motive, purpose, acting, combination or conspiracy charged in said bill, and therefore leaves plaintiff to make such proof as it may be able to produce without this:

That this defendant, on to-wit, December 30th, A .D. 1901, being a citizen of the State of Texas, was temporarily residing in the city of Washington, in the District of Columbia, and was then and there an attorney at law, duly licensed as such by the honorable, the Supreme Court of the United States. That upon the last named date, the said judgment in favor of Jennie M. Mettler as plaintiff and against the complainant herein, was then pending in the Supreme Court of the United States, and the said Jennie M. Mettler and the said William H. Clark, desiring the services of this defendant in the matter of the briefing and oral presentation of said case to the Supreme Court of the United States, did contract with this defendant, as follows, to-wit:

"In the Supreme Court of the United States.

FIDELITY MUTUAL LIFE ASS'N OF PHILADELPHIA

vs.

JENNIE M. METTLER.

Writ of Error from United States Circuit Court at Dallas.

This agreement witnesseth: Whereas, Jennie M. Mettler, as plaintiff, recovered judgment against the Fidelity Mutual Life Ass'n of Philadelphia in the above entitled cause, as fully appears from the record of the suit; and,

Whereas a writ of error has been taken from the judgment of the court below, at Dallas, Texas, to the Supreme Court of the United States at Washington, by said company, and the cause is yet to be briefed and submitted in the Supreme Court for the said Mrs. Mettler, as well as said insurance company;

Premises considered, we, the said Mrs. Jennie M. Mettler, a *femme sole*, and W. A. Clark, her attorney, the owners of said judgment, hereby employ Chas. A. Culberson of Dallas, Texas, now temporarily residing in Washington, D. C., to brief said case for and in behalf of the said Mrs. Jennie M. Mettler, defendant in error, and to orally argue said case for her on the submission thereof in the Supreme Court; and for and in consideration of such services rendered and to be rendered by him, we hereby give, transfer and assign to him, said Chas. A. Culberson an interest of one thousand ($1,000.00) dollars in and to said judgment, and also the cause of action, that is, policies of life insurance sued upon. It is understood that the payment of said fee is contingent upon a recovery upon said policies. It is further understood that five hundred dollars of said one thousand dollars is to be paid out of the interest of said Mrs. Jennie M. Mettler in said suit, and that the remaining five hundred dollars is to be paid out of the interest of said W. H. Clark therein, and that the one is not to be responsible for the portion to be paid by the other; that is each one undertakes to pay said Chas. A. Culberson five hundred dollars, as aforesaid.

Witness our hands, this 30th day of December, A. D. 1901, at Dallas, Texas.

MRS. JENNIE M. METTLER,
JENNIE M. METTLER,
By WM. H. CLARK, Her Attorney.
WM. H. CLARK.

HOMER, OHIO, LICKING CO., January 7th, 1902.

I do hereby certify that the above named Mrs. Jennie M. Mettler appeared before me and acknowledged the signing of this instrument to be her voluntary act and deed.

J. S. WILLIAMS, J. P."

That in pursuance of such contract, this defendant did prepare and assist in the preparation of the briefs filed in the said cause in the Supreme Court of the United States, and did present said cause to the Supreme Court of the United States on oral argument, and that the amount contracted to be paid this defendant by the said Jennie M. Mettler and the said William H. Clark was a reasonable, usual and customary charge. That on June 3, 1902, the clerk of this court drew his check No. 426 in favor of this defendant for $1026.00, said check being drawn on the American National Bank of Dallas. That said check was in payment of the aforesaid fee of $1000.00 earned by this defendant, and to reimburse him in the sum of $26.00 for necessary and proper disbursements made by him, and that this defendant endorsed said check to the National Exchange Bank of Dallas, which bank paid same on June 12, 1902, to this defendant by giving him credit therefor, and this defendant checked said money out of said National Exchange Bank of Dallas and used the same and is not now nor was he at the time of the filing of the original bill herein the owner of any of said money.

IV.

This defendant further avers that he was not present at, nor did he participate in, the trial of said cause in the court below; that he had no connection whatever therewith, until the record thereof was perfected and filed with the clerk of the Supreme Court of the United States. That he had no knowledge, information, belief or suspicion that W. A. Hunter was not in fact dead, nor that said action at law was not brought and prosecuted in good faith for an honest demand,

with an honest purpose and intent upon lawful and just grounds, nor that any facts alleged or proven by or for said Jennie M. Mettler in said action at law, were false or fictitious, nor that any witness or testimony in her behalf was perjured, false or untrue; nor of any facts or circumstances reasonably calculated to arouse doubt or suspicion of the justness of her demands, nor other than produced at the trial of said cause, and then equally known to the plaintiff herein. That, upon the contrary, when said record was examined for the first time by this defendant, it appeared therefrom that the issue had been tried, submitted to a jury and that the jury had returned a verdict to the effect that W. A. Hunter was dead, that the trial court affirmed the verdict and entered a judgment in all things in accordance therewith, and that thereafter the trial court overruled the motion of complainant herein for a new trial therein, and thereby sanctioned in all things the correctness and justness of the verdict so rendered, and that the only connection this defendant had with said cause was to assist in the preparation of the brief upon and to orally present on behalf of said Jennie M. Mettler to the Supreme Court of the United States the legal questions arising on the face of the record.

V.

This defendant further avers that the trial of the issue by the jury in the action at law mentioned in complainant's original bill of complaint cannot now be questioned, tried, retried, annulled, set aside, nor inquired into, in that the queston of whether or not W. A. Hunter was dead was tried by a jury and such question cannot be tried in this proceeding, in that this proceeding is in opposition to the provisions of the 7th amendment to the Constitution of the United States, and all of this defendant is ready to verify.

VI.

And this defendant denies all and singular and all manner of unlawful combination and conspiracy wherewith he is by said bill charged or that is sought to be established to his prejudice, without this, there is no other matter, cause or thing in said plaintiff's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant. All of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court may direct, and humbly prays to be hence dismissed with his reasonable cost and charges in this behalf most wrongfully sustained.

C. A. CULBERSON, Defendant.

F. M. ETHERIDGE,
RHODES S. BAKER,
Solicitors for the Defendant, Charles A. Culberson.

ANSWER OF THE PHILLIPS INVESTMENT COMPANY.

The answer of the respondent, Phillips Investment Company, omiting the formal parts, is as follows, (Rec. p. 52):

The defendant, Phillips Investment Company, now and at all times hereinafter saving and reserving to itself all manner of benefit and advantage of exception and demurrer to the many errors and insufficiencies in complainant's original bill of complaint contained and the amendment thereto, and for answer thereunto or unto so much and to such facts thereof as this defendant is advised is material for it to make answer unto, answers and says:

This defendant admits that it, the Phillips Investment

Company, is a private corporation duly incorporated by the State of Missouri, long prior to October 29, 1901.

This defendant admits the allegation contained in subdivision 4 in paragraph 6 of plaintiff's bill.

Defendant denies the allegation in subdivision 5 of paragraph 6 of the bill to the effect that the clerk of said circuit court on June 3, 1902, paid out to the defendant, Phillips Investment Company, the sum of fifteen hundred and forty and 25-100 dollars, but says that the facts with respect to said payment are more accurately set out in the amended bill.

That as to each and all of the other averments contained in plaintiff's bill, this defendant says that it can neither affirm nor deny the same, for the reason that it is not advised of the truth or lack of truth in the said averments contained; but this defendant says that its knowledge and connection with the subject matter is truthfully and fully set forth hereinafter in its special plea and answer.

This defendant admits the averments contained in plaintiff's first amendment to its original bill, in the paragrph marked "7 1-2," to this extent alone, namely, that its connection with the subject matter of the litigation, which was remote, as hereinafter more particularly set forth in its special answer, has been characterized by the utmost good faith and without notice of the fact that one William A. Hunter was connected with the subject matter of such litigation, and without knowledge of the issues involved.

This defendant disclaims any knowledge of the matters further contained in said paragraph 7 1-2 of plaintiff's first amendment of its original bill of complaint, and says that it can neither affirm or deny the truth of the allegations, except with respect to the following pertaining to this defendant.

Defendant says that the averments in said amendment of plaintiff's original bill, as follows:

"The sum of fifteen hundred forty and 25-100 dollars, re-

ceived by Phillips Investment Company, as set forth in section 6 of this bill, was paid to it by the clerk of the court by means of his check No. 424 for fifteen hundred forty and 25-100 dollars, drawn June 3, 1902, on the American National Bank of Dallas, Phillips Investment Company endorsed said check and transferred the same to the Bank of Montreal, which endorsed the same and transferred it to the Fourth Street National Bank of Philadelphia, which, in turn, endorsed the same and transferred it to the City National Bank of Dallas, and to said bank it was paid June 16, 1902, through the Dallas Clearing House by the American National Bank of Dallas. Said payment was made to said Phillips Investment Company by reason of and in pursuance of the assignment described in the fourth paragraph of section 6, of this bill. By said assignment under date of October 29, 1901, William H. Clarke, assigned and transferred to Phillips Investment Company all his interest in the cause of action and judgment in said cause of Jennie M. Mettler against this plaintiff, describing the same as follows: 'All my right, title and interest, that is my contingent attorney's fees of about $8000.00, in the cause of action and judgment of about $21,500.000 rendered thereon on the 4th day of July, 1900, in the United States Circuit Court of the Northern District of Texas, at Dallas, in the life insurance case of Jennie M. Mettler vs. Fidelity Mutual Life Association of Philadelphia, numbered 2118, said judgment rendered as aforesaid, in favor of Mrs. Jennie M. Mettler, and against said association, from which judgment a writ of error is now pending in the Supreme Court of the United States.' Said assignment was given as collateral security for a certain promissory note, dated October 29, 1901, whereby said William H. Clark promised to pay said Phillips Investment Company, on or before March 1, 1902, the principal sum of fourteen hundred seventy-one and 57-100 dollars, together with interest thereon at the rate of 8 per centum per

annum from date, such interest to be paid semi-annually, and each installment thereof to bear interest at the rate of 10 per centum per annum from its maturity. Said note was given for pre-existing indebtedness. Said assignment was filed with the clerk of the court December 2, 1901, when said assignment was given and accepted, and when it was filed in the circuit court, said cause was pending in the Supreme Court, to which the plaintiff had removed it by a writ of error filed September 1, 1900. At said time also the judgment in said cause had been suspended by a supersedeas bond filed by this plaintiff September 1, 1900," are true, but do not contain all the material facts which sustain the meritorious defense on the part of this defendant, and which are more particularly set out hereinafter.

This defendant especially denies the allegations in plaintiff's said amended bill, as follows:

"In accepting such assignment of such cause of action and such suspended judgment, Phillips Investment Company was bound to take notice of the rights and defenses of this plaintiff, as disclosed by the record in said cause. Moreover, this plaintiff has reason to believe, and does believe, and so alleges that in accepting said assignment Phillips Investment Company was acting under advice of attorneys, the aforesaid William M. Alexander, and William Thompson, then doing business as co-partners under the firm name of Alexander & Thompson. Said Alexander & Thompson when they advised Phillips Investment Company to take such assignment had actual knowledge, as aforesaid, that this plaintiff by its pleadings filed in said cause, denied that William A. Hunter had died as alleged. This plaintiff further has reason to believe, and does believe, and so alleges, that aside from the knowledge of its said attorneys, Phillips Investment Company had actual knowledge when it accepted said assignment of the fact that the principal issue involved in said litigation was that of

the alleged death of said William A. Hunter, and that this plaintiff denied that he had died as alleged. Sometimes, however, Phillips Investment Company pretends that it can disregard said assignment and rest its rights upon the check given it by the clerk of the court, as aforesaid, and upon its surrender of said note in exchange therefor. As to this plaintiff avers the truth to be, that said check was given solely and because of and in pursuance of said assignment. And, further, it avers that in accepting such check and surrendering such note Phillips Investment Company was represented by, and acted only through, its said atorneys, Alexander & Thompson; and that they then and there had full knowledge of the main issue involved in said litigation, and knew that the plaintiff had always denied that William A. Hunter had died, as alleged, and had always availed itself of every legal method of enforcing such denial. This plaintiff further avers the truth to be that Phillips Investment Company parted with no new and valuable consideration in exchange for check, but accepted the same in discharge of antecedent indebtedness."

For further and special answer, and in addition to those allegations contained in plaintiff's amended bill which are expressly admited herein, this defendant says that William H. Clark, one of the defendants in this cause, was, in October, 1901, indebted to this defendant in a sum of between $1300 and $1400, which was evidenced by his promissory note that at the solicitation of William H. Clark this defendant gave him an extension for the time of payment of said note, in consideration of which the said William H. Clark executed a written transfer as collateral security wherein he conveyed his interest in the subject matter of the judgment in the cause of Jennie M. Mettler v. Fidelity Mutual Life Association of Philadelphia.

This defendant says that it was advised at the time that an appeal was pending from said judgment, and that the cause

was to be heard and determined finally by the Supreme Court of the United States. But this defendant says that it parted with nothing of value to it, by reason of the security afforded it in the transfer of the interest of said Clark in said judgment, other than the extension of the time of maturity of said note.

This defendant says that it did not investigate into the merits of said cause and did not become cognizant of the issues involved in said cause. Defendant says that the said William H. Clark had previously been its attorney for many years in connection with W. M. Alexander, and that it was content to deal with said William H. Clark without employing an attorney to represent its interests in connection with said security.

Defendant says that it retained the said note, secured, as aforesaid, by the transfer of the interests of William H. Clark in said judgment.

That afterwards, to-wit, in May, 1902, the clerk of the Circuit Court of the United States for the Northern District of Texas, at Dallas, communicated notice to it, through Alexander & Thompson, that it would, under the orders of the court, pay the amount of said note held by it against William H. Clark, upon the surrender of said note. This defendant says that thereupon it mailed from Kansas City to Alexander & Thompson, at Dallas, Texas, the note of William H. Clark, as aforesaid, amounting, principal and interest to $1540.25, and did a few days thereafter receive a check drawn by the clerk of said court, in manner and form as set out in plaintiff's amended bill.

This defendant says that it is informed, believes and so alleges that the said note executed by William H. Clark, and mailed by this defendant to Alexander & Thompson, was surrendered to the clerk of the court, and was, under the orders of the court, cancelled and surrendered by the clerk of the court to William H. Clark.

This defendant says, furthermore, that it is informed, believes and so alleges, that the said William H. Clark was, during the months of May and June, 1902, possessed of large funds, and was amply able to pay said note, and would have paid the same on presentation, and said note would have been presented to him and would have been paid to this defendant, except upon the notification by the clerk of said court that he was ready to pay the same upon presentation to him.

This defendant says that it would not have made surrender of said note to the clerk of the court, except upon the belief that this honorable Court, in disbursing the fund in question, would protect this defendant, which parted with the possession of the note only upon the consideration of the payment being made to it, and defendant relied in good faith upon the power and duty of the court to protect it under the circumstances.

And this defendant says that without default or neglect on its part, but upon the reliance on its part in the conclusive finality of the judgment of the Supreme Court of the United States, which judgment had been voluntarily paid by the plaintiff, so this defendant alleges on information and belief, and upon the faith in this honorable Court in distributing the fund, and calling upon this defendant for the surrender of the note, this defendant pleads that it is entitled to the protection of the court.

Defendant says, furthermore, that it is advised, believes and so alleges that the said William H. Clark is now unable to pay the amount of said note, and defendant has long since parted with the possession of said note, which was surrendered, as aforesaid, by the clerk of the court and cancelled, and the circumstances will not admit of this defendant being restored to the position that it was at the time it was invited, as aforesaid, to surrender, and did surrender, its evidence of indebtedness into the custody of the court.

This defendant specially denies that it had any knowledge

prior to the institution of this suit, of the issues involved in said cause, and it denies that it had parted with any material consideration, or would have done anything to affect its status by virtue of said assignment, as a creditor of said William H. Clark's, except to extend the time of payment of said note.

This defendant says that it parted with the possession of said note upon the faith in the virtue of the final judgment in said cause, and upon faith in the virtue of the orders of this court in directing payment to it of the amount of the note and interest, and upon the surrender of the note and the cancellation of the same; and this defendant did and performed these acts without notice, but as a stranger to the merits of the said cause; wherefore, it says that in good conscience and equity it is entitled to the protection of the court as against the claim of plaintiff.

This defendant says that such action as was taken in its behalf by Alexander & Thompson was purely gratuitous, and did not involve the relations of attorney and client. This defendant says that the said Alexander & Thompson advised this defendant that they could not act as attorneys adversely to the said William H. Clark, who had previously been associated with them as a partner for years; and defendant says that there was no occasion for it to invoke the services of attorneys, but that it dealt directly with William H. Clark with respect to the subject matter, and such services as were rendered by Alexander & Thompson, as above stated, were gratuitous, not those of attorney to client, and not of an advisory character.

All of which matters and things this defendant is ready to aver, maintain and prove, as this honorable Court shall direct, and hereby prays that it be discharged hence with its reasonable costs in this behalf sustained; and defendant prays that the final decree rendered herein fully protect this defendant in all respects as should obtain under the facts in a

court of equity; and defendant prays for all relief, general and special.

(Signed) ALEXANDER & THOMPSON,
Solicitors for Defendant Phillips Investment Company.

The effect of the ruling of the trial court upon the demurrers, as well as the final disposition of the case, in so far as these respondents are concerned, was to render of no importance in the trial court their contention to the effect that under the operation of the Seventh Amendment to the Constitution of the United States, the Circuit Court was without power to grant the relief sought. The case below was disposed of on other grounds, as is manifest in the first place, by the action of the court in overruling the demurrer asserting the constitutional immunity, and in the second place by t holding of the court, that regardless of the constitutional question, the bill and brief disclosed no equity in the complainant, as against these respondents.

The opinion of the Circuit Court is reflected in the following paragraph of the reasons announced for its dismissing the bill, as against these respondents:

> "As to the defendants other than the Smythes, it is admitted by the complainant, that each of them was without knowledge and innocent of the fraud which was being perpetrated on the insurance company in the suit at law. The defendants, William H. Clark, Charles A. Culberson and Morris A. Spoonts were attorneys retained by the plaintiff Jennie M. Mettler, at various stages in the suit at law to represent her before the courts in the prosecution of her claim against the insurance company. They and each of them, performed legal services for her in the prosecution of her alleged claim, and in contemplation and in consideration of such services, received a substantial part of the proceeds of the judgment in the case at law after it was paid into the registry of the court. The bill of complaint and evidence in the record disclosed with particularity the manner in which of the atorneys who are made

defendants came into possession of his portion of the fund paid into court. The various assignments, legal and equitable, are set forth and proved, in order to show the interest and part of each under the judgment acquired, and also to show to what extetn participated in the fund. After consideration, I have reached the conclusion, that the rule enunciated and relied upon by counsel for complainant with relation to the assignment of judgments, to the effect, that the assignee of a judgment takes it subject to all equities existing between the litigants, whether it had notice of the same or not, has no application under the facts of this case. Here the judgment was fully satisfied by payment. Complainant seeks to follow the proceeds of the judgment into the hands of the parties who received it innocently and in payment for services rendered. The record discloses that the money was innocently expended by them, and I cannot find any principle, either of law or of equity, which under the circumstances will compel restitution from them. It is true they were put on notice of complaintnt's claim in the suit at law, that Hunter was not dead, but living, but in the absence of corrupt knowledge on their part that he was living, they had a right to rely upon the solemn and deliberate judgment of the court that he was dead, and so far as they are concerned, that judgment, so entered, concludes the insurance company.

"The defendant, Phillips Investment Company, is in quite as favorable an attitude as any of the defendant attorneys. It innocently received an assignment of a portion of the judgment from the defendant Clark, as collateral security for the debt owing to it by him, and it participated in the fund paid into court in satisfacton of the judgment, and surrendered ts evidence of indebtedness against Clark in consideration therefor. It is quite blameless in the premises, and, as stated with relation to the attorneys who are defendants, I know of no rule, either of law or of equity, which would compel the Phillips Investment Company to return what it has received under this judgment.

"The view expressed here with relation to the atitude of the defendants, other than the Smythes, should have led to

the sustaining of the demurrers interposed, and insisted upon by them. It now leads to the dismissal of the bill against them, with their costs, and the decree will so provide."

The learned counsel for the appellant in the brief filed in this cause has built up an ingenious elaboration of general rules of equity pertaining to following non negotiable property into the hands of third parties, and pertaining to the assignments, legal and equitable, of judgments at law and decrees in equity. But he has made no serious attempt to point out wherein such rules are applicable to this recovery, and he makes no serious attempt to escape the principles announced by the Circuit Court in disposing of this controversy, to-wit:

1. That the rules about assignments of judgment have no application, because this proceeding, as against these respondents, but incidentally affects the judgment, *and is substantially an attempt to follow money innocently received by these respondents and innocently disbursed.*

2. That they are purchasers for value and without notice.

3. That respondents, though put on inquiry by complainant's claim that Hunter was living, had the right to rely upon the deliberate judgment of the court to the contrary.

Complainant, while driven to the necessity of admitting that these respondents are in this matter devoid of blame, yet argues this case as if a moral question were involved, and devotes much the greater portion of its remarks to a discussion of the iniquity of their position. It cannot be that the respondents are "free of blame," "innocent," "acting in entire good faith," etc., and yet partner's in a gigantic swindle. The case is one in which, if the complainant prevails at all, it must prevail by reason of technical rules, and it labors under the necessity of showing this Court cause for giving to those technical rules a vitality superior to the acknowledged equities of

these respondents. The burden further is on it of developing a plain case for the application of these technical rules. Really it is not seeking equity, but a pound of flesh, and but for the prayer for the vacation of the law judgment, it would have no claim upon the equity jurisdiction of any court. We confidently submit, that when all of the facts are maturely considered by this Court, it will appear almost to the point of demonstration, that the leading principle upon which complainant relies has no application to this case.

Where, as in this case, the demand of the complainant is devoid of characteristic equitable features, and it comes into a court of equity solely by reason of a prayer for relief, which does not rest, as against these respondents, upon an equity, we feel free to invoke, as we do, acknowledged legal, as well as settled equitable defenses. These we will endeavor to present in the succeeding pages of this brief.

FIRST.

The Material Issues.

1. It is contended by the appellees, that the Constitution of the United States forbids the maintenance of this suit. In support of this suggestion, the Seventh Amendment is relied on, wherein it is provided: "No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

2. It is urged that the bill of complaint is without equity. The particular principle relied on is, that in a court of equity where a final judgment at law is assailed, as having been obtained through fraud, it must appear as a condition precedent to the granting of the relief sought, that the fraud is in matter extrinsic and collateral to the issue in fact tried in the law action, and not in respect to a fact directly in issue in the former suit, and that the present case falls within that class where equity refuses relief.

3. It is shown that these respondents are innocent purchasers for value of all benefits which they have severally received, as the result of the successful prosecution of the law action, that they are not charged with any notice of any defects in their title to same, and that the only claim of adverse right ever brought to their attention, to-wit, the claim by the insurance company that Hunter was living, was investigated and settled adversely to the insurance company after a plenary trial and writ of error to the highest court in the land, before appellees ever accepted any benefits under their respective purchases.

4. The equities of the innocent respondents being at least equal to the equities of complainant, and their legal title having been made perfect by the voluntary payment by complainant of the valid demands they held against Mrs. Smythe, no case for restitution is shown. Especially is this the case where the innocent parties sued have innocently disposed of the property sued for before suit brought without notice of the complainants' alleged equity.

5. It being admitted that all monies paid out by the complainant were so disbursed upon a judgment of a court of competent jurisdiction, and no privity being shown between complainant and the present respondents, the complainant has no legal or equitable demand against these respondents, nor ability to make illegal now the retention by these respondents of monies which they were lawfully justified in receiving when paid.

6. The theory of the bill, as against the appellees, being that they held funds which equitably belonged to complainant, it should have been alleged in the bill and shown through the proofs, that appellees held such properties of complainant at the time it exhibited the present bill against them, and such fact not appearing, and no fraudulent disbursement by these appellees being suggested, the bill cannot be maintained.

SECOND.

The Constitutional Question.

The Seventh Amendment provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. This provision finds its fullest historical exposition in the opinion rendered on behalf of this Court by Mr. Justice Gray, in Capital Traction Company v. Hof, 174 U. S., 1; but that decision does not necessarily determine in favor of the appellees the present contention. It goes far towards sustaining their position, but is not conclusive, and notwithstanding that case, it remains for this Court to answer for the first time the important query presented in this record, to-wit:

Will a Circuit Court of the United States sitting in equity and deriving its powers from the laws of the United States re-examine an issue of fact, which has been already finally determined at law after a plenary hearing before a jury, constituted in accordance with the guaranties of the Constitution of the United States, and upon such re-examination annul such decision at law, on the ground that an improper conclusion was reached, and substitute its own judgment for that of the law tribunal?

The letter of the Constitution would seem to require this question to be answered in the negative. It reads plainly that the fact tried by the jury shall not be *otherwise* re-examined *in any Court* of the United States than according to the rules of the common law. Plainly where the fact has been tried by a jury, and the same fact is brought again before an equity court of the United States for re-examination, the letter of the Constitution is violated

The answers that are offered to this statement of our position are two-fold.

First: That the quoted language of the Seventh amendment is designed to impose restriction solely upon the appellate courts of the United States in their hearing of revisory proceedings taken to reverse results attained in the trial court in jury cases; and

Second: That if the language of the Constitution be held to restrict the equity courts in a proper case, still the rule is not applicable here, because in the present case the complainant is not seeking to have equity retry the fact decided at law, but a different fact.

I.

The question of law raised by the first answer is difficult of solution. The history of the amendment, as detailed in the Hof case already referred to, shows that the people of the United States were not satisfied with the measure of power given to the courts of the United States in the original draft of the Constitution. By some it was feared that too little dignity and vitality was given to the results obtained in a jury trial. By others it was feared that the right of a jury trial in all proper cases was not sufficiently guaranteed; and by still others it was feared that the power of the appellate court was not sufficiently defined, and that in spite of the guarantees pertaining to the jury trial in the *nisi prius* courts, there was danger that the results of such trials might be disturbed by revisory tribunals.

With these ends in view, an agreement was finally reached, and finds expression in the language now under consideration. This language, we submit, should not be construed as accomplishing simply the ends which Mr. Madison had in mind, nor as accomplishing simply the suggestions of Mr. Gorham, Mr. Hamilton or any other one statesman of that epoch, nor must it be construed as simply extending the provisions of the old organic law relating to juries and the results of jury

trials. On the contrary, it should be interpreted, if its language fairly admits of such interpretation, as containing the substance of all the remedies which the people had demanded for all the existing evils.

The appellant here seeks to restrict the amendment unduly, and to treat it as applying solely to appellate procedure and as giving effect only to the views of the statesmen, who were disturbed over the power of the appellate tribunal, instead of giving it that liberal construction which constitutional provisions, especially as they appear in the Federal instrument, are usually given.

There is every reason for treating the language as applying to the action of any court of the United States, whether of law or equity, re-examining an issue of fact which has been once actually litigated before and decided by a common law jury. It is a recognized principle in our judicial history that issues of fact on all questions, except those purely technical, should be decided by juries. They have been a constituent part of our Federal courts since the organization of the government, and no disposition has been shown, either on the part of Congress or of the courts, to restrict their powers. The people, at the time of the adoption of the Constitution, were used to jury trials, and in subordinating their local governments to the national government desired chiefly to preserve to themselves, so far as their affairs might fall within the realm of the judiciary of the general government, the old fashioned mode of trial of issues of fact in law actions and criminal cases to which they were accustomed. They desired that the results of a trial by jury where there had been a real investigation of a given fact should not be frittered away, and hence the broad language of the amendment. It is matter of common knowledge, that the Constitution in its original form, would, in all likelihood, have failed to receive the approval of the necessary number of States, had it not been that

men of the highest character and eminence in the several communities assured their constituents that amendments remedying matters to which the people objected would find place in the Constitution as soon as practicable, after it went into effect.

Where the letter of the instrument itself includes the inhibition which we here invoke, and the inhibition is one which is consistent with the public history of the times and the further development of the nation, we submit, no reason is shown for limiting the provision to some one object narrower than its express language.

AUTHORITIES.

Capitol Traction Co. vs. Hof, 174 U. S., 1;
Parson vs. Bedford, 3 Peters, 433;
Chicago etc. Ry. Co. vs. Chicago, 166 U. S., 226-246;
Justices vs. Murray, 9 Wallace, 274, 277;
Dillingham vs. Hawk, 60 Fed. Rep., 494.

This construction does not interfere with the legitimate power of the equity courts. Notwithstanding a case may have been tried at law before a common law jury, the equity court still has the undoubted authority to hear objections to that judgment, which could not have been made at law, either because of their nature or because they were not brought forward on the trial of the law case on account of any accident, mistake or wrongful conduct of the successful party, which prevented the hearing at law from being a real determination of the issue apparently decided. That is, the equity court would have the power, notwithstanding the Seventh Amendment, to re-examine in a proper case an issue apparently tried before a jury at law, when it was made to appear that the jury did not really hear or pass upon the issue. If the unsuccessful party was prevented from exhibiting a defense, as by

being kept from court, or deceived as to setting, or misled into believing the facts to be different from what they really were, or was surprised, accidentally hindered—any of these circumstances might prevent the trial at law from developing the real contest on any given fact submitted to and decided by the jury. In such case, he could find relief at equity, but he could not find relief at equity when he has suffered no deceit, but has deliberately accepted trial upon a known issue, and unavailingly exhausted his resources in the common law forum. To permit such a party to retry his case before the equity court would nullify the constitutional safeguards pertaining to the common law jury.

II.

Assuming that the Court will adopt our contention, that the Constitution prohibits the re-examination of a fact actually tried at law, we will now endeavor to show that this issue tendered us in the present proceeding was actually tried at law within the meaning of the Seventh Amendment.

The controlling issue of fact in the trial of the law action was that Hunter did not lose his life, as claimed by the plaintiff, and that the appearances relied on as proof of his death, were brought about through the fraud of Hunter, participated in by the plaintiff. Many circumstances tending to show this fraud were relied on and three witnesses, who claimed to have seen Hunter alive after the date of his disappearance, as claimed by plaintiff, testified on behalf of the defendant, detailing the fact of having seen him and conversations with Hunter.

The petition upon which the law action was tried is shown at pp. 10-16 of the Record. It avers the facts essential to recovery, including the death of Hunter, and oppressive and deceitful conduct towards plaintiff on the part of the adjuster of the Insurance Company, R. C. Milliken, with reference to

the preparation and acceptance of proofs of death. The answer of the defendant, shown at p. 17 of the Record, containing a general denial, put in issue all the material facts of plaintiff's petition. The bill of exceptions in the law case affirmatively states the ultimate fact being contested in the case in the following language and may be taken as a pleading—defining the issue to be tried: "Defendant admitted that all matters of proof relating to the death of the insured—all formal proofs are sufficient, and that the only question to be tried and involved, is the question of whether or not W. A. Hunter is dead, as claimed in the plaintiff's petition, and whether he died in the manner and form, as alleged therein." (Rec. p. 414.)

What was meant by these pleadings and the admission is shown by the testimony in the present case, as follows:

A. J. Brown, the general agent of the Insurance Company for Texas, and who issued the Hunter policies, and who still represented it when Hunter was drowned, testified, (Rec. p. 224):

"Q. It is a fact, Mr. Brown, is it not, that you believed from the time his (Hunter's) death was reported, that he was not dead, and *it was a scheme concocted to extort money?*"

A. "Yes."

Q. "When did you first have that belief?"

A. "The moment I read the telegram from the president on the 3rd day of January. These policies were delivered the 7th day of November, as well as I remember. I knew nothing about Hunter here, until the January following."

Q. "When did you suspect that he was not dead?"

A. "The moment I read that telegram. When I got that telegram, I remarked: 'We are in for it; this is a fraud'."

Q. *"You and the company acted on that idea, that it was a fraud, from the inception?"*

A. *"Yes sir."*

Q. *"Mr. R. C. Milliken, he was entrusted by the Company to investigate and ferret out, if he could, the fraud?"*

A. *"Yes sir."*

* * * * * * * *

(Rec. p. 225):

Q. "His (Milliken's) work was that of a detective undertaking to ferret out this matter?"

A. "He was inspector for the Company; his business was to inspect risks, and whenever a case that was supposed to be fraud showed up, it was his duty—his instructions were to make an investigation."

L. G. Fouse, President of the Insurance Company since 1878, testified (Rec. p. 272):

"Q. Please state at what conclusion the plaintiff company arrived as to the justness of the claim made by Mrs. Mettler, and state in a general way what efforts were made, if any, to ascertain whether, in fact, Hunter was dead, covering in your statement the period of time elapsing between the date of his disappearance on December 3, 1896, and the date of the trial of Mrs. Mettler's suit against the plaintiff, in May, 1900?

A. On receiving the proofs submitted by Mrs. Mettler, we reviewed the same carefully, and reached the conclusion that Hunter had not drowned, as alleged, because the physical conditions for such an accident were highly improbable, and the fact that the one horse was tied to a bush close to the wagon, and that the other horse was found at some distance, near a railroad station, and pased through three gates, that, according to the investigation, had been closed; and that the handbag disappeared, which he was not liable to have on his person; taking into account the climate and conditions of the weather, that instead of its being a case of accident, it was a case of disappearance. Having reached that conclusion,

we governed ourselves accordingly, and followed up every possible clue for the purpose of finding him. Among the several efforts made was one at Nashville, Tennessee, resulting from a communication received from a person by the name of D. G. Wallace, who stated that he had met Hunter in that city, and we immediately proceeded to attempt to locate him. All the hotel registers were examined and a thorough search made, but without result. As an illustration of the several efforts made, I will state, that we read in a weekly paper, published at Farmington, in New Mexico, that one W. H. Hunter had exhibited some crude oil that he obtained in a meadow. We sent an inspector to Farmington, which required a stage trip of many miles and involved a heavy expense, with the result that it was not, as we thought it might be, W. A. Hunter. The aggregate expense involved in the search was in the neighborhood of Five Thousand Dollars, without counting the salaries, which would probably increase the expenditure to twice that sum.

Q. Through what period of time did the plaintiff company prosecute its search for Mr. Hunter, or for definite and positive evidence that he was still living?

A. Beginning with the time of the submission of the proofs, notwithstanding the verdict of the jury to the contrary, we believed that he was living, and never ceased to prosecute the search until he was found."

R. C. Milliken, Inspector for the Insurance Company since prior to Hunter's disappearance, testified, (Rec., p. 231):

"Q. About how long did you continue your investigations into the question as to whether or not Hunter had died, and your efforts to obtain evidence?

A. Nearly two weeks. I think it was nearly two weeks, I worked on the case right there in the town of Pecos.

Q. Please state whether the answers given you by Mrs.

Mettler, to the questions propounded to her were faithfully recorded by you?

A. They were.

Q. *What was the substance of your report to the Company as the result of your investigations at Pecos, as to whether Mr. Hunter had been drowned?*

A. *I reported that he had not been drowned and that it was a fraud upon the Company."*

* * * * * * * *

(Rec. p. 233.):

"Q. Please state the circumstances attending the exhibition of this telegram to Mrs. Mettler as fully as you can?

A. *When I had been out there some two weeks making an investigation, I was thoroughly convinced that Hunter was alive, and that a fraud had been perpetrated on the Company I had made investigation at the ticket office, both at Pecos and at other places where tickets had been sold, and I wanted to know whether she was a party to the fraud.* I wanted to know also where he went to; which direction, which train—whether, north, east, or west—he took. I had a friend, Mr. J. J. Goode, whose name is signed to that telegram, living in El Paso—a man who once resided in Dallas, Texas, a son of the former district judge of this city. I prepared that telegram, word for word, and wrote him to send it to me at 10 o'clock sharp on January 28, 1897, and told him at that time I would be at Mrs. Mettler's boarding house, or where she was stopping—Mr. Heitman's. Before going up to Mr. Heitman's house, I went to the Western Union office in Pecos and told them that if any telegram came for me to send it up to Mr. Heitman's, that I would be up there. I went up to see and talk to Mrs. Mettler, and while talking to her the messenger boy delivered me that telegram. I paid him for it and broke it open and read it, and turned it over to Mrs.

Mettler, now Mrs. Smythe, who read it, took several minutes with her eyes fixed on the paper all the while, and finally she remarked: 'Thank God, my brother is still alive.' *I told her to give me the policies, and she told me that when her brother come she would turn them over to me.* She didn't drive me out of the house. I walked out of the house without any word from her at all."

With this opinion as to the merits of the claim of Mrs. Smythe under the insurance policies there involved, the insurance company, after making the admisison above set out on the trial of the law action, voluntarily went to trial asking no postponement, evidently confident of success, adduced a great volume of testimony, tending to show the improbability that Hunter had died as claimed, and the probability that Mrs. Smythe must know of the manufactured circumstances, and brought forward three witnesses who testified to his having survived the alleged disappearance: One who claimed to have seen him on the train passing through the State of Arkansas in the direction of Tennessee; and two who claimed to have seen him and talked with him about various matters in Nashville, Tennesse. The circumstances strongly relied on in support of its defense at law include most, if not all, of the material facts detailed in the brief of the insurance company on this appeal at pp. 34-39.

The persistence of the insurance company in its belief that it was confronted with a fraudulent claim, and the identity of the issues at law and equity, is further illustrated by an excerpt from its brief in the law action, which appears in the appendix.

The claim in the present suit and the only claim is that Hunter did not die, as claimed in plaintiff's petition in the law action, nor in the manner and form as alleged therein, but that through his fraudulent conduct, participated in by his sister, the plaintiff in the law action, she obtained a re-

covery in the law action upon inferences, properly deduced from that record, but contrary to the true facts.

To support this case in equity, the complainant has reproduced practically the identical case, as made upon the law action, makes here the same charges of conspiracy, plotting and fraud, shows that the officers of the insurance company believed the original claim to be a fraud from its inception; and produces cumulative testimony of some three or four witnesses, who claim to have discovered Hunter since the payment of the judgment in the first action, and who testified to alleged conversations with him. It also shows what has been done with the money which paid off the former judgment.

The last mentioned fact has no bearing upon any isue made in the law action, and is only material in case complainant obtains the decree which it here seeks. The first group of facts, to-wit: Those concerning the alleged discovery of Hunter, etc., are but cumulative to the testimony of the three witnesses in the law trial, who claimed to have seen Hunter after his first disappearance.

We confidently assert that the fact tried by the jury in the law case is the same fact that is now drawn in issue in this case, and that having been examined there, it is not now open to re-examination in this Court. The circumstance that evidence cumulative to that introduced in the law action is produced here cannot affect the operation of the rule.

It is as if upon the trial of an action at law to recover money, payment were pleaded, and witnesses pro and con introduced and a verdict reached, that there had been no payment. Afterwards, a receipt is discovered, or another witness to the fact of payment is found, and bill for review exhibited, in which the charge is made that further proof of payment has been discovered, and that the evidence of the witnesses for the plaintiff on the first trial was false and the non-

introduction of evidence of payment fraudulent. Plainly, the fact to be tried on the last hearing would be payment *vel non* just as on the former trial.

THIRD.

The Bill Lacks Equity.

Independent of constitutional inhibition, a Circuit Court of the United States sitting in equity will not re-examine and revise a judgment at law, *simply upon an allegation of fraud intrinsic in the law judgment.* Its jurisdiction in case of fraud is stated by this Court in many cases. The essential principles involved find embodiment in the language used by Mr. Justice Miller in United States vs. Thockmorton, 98 U. S., 61 (68):

> "The acts for which a court of equity will on account of fraud set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to the fraud in the matter on which the decree was rendered. The mischief of re-trying every case in which a judgment or decree was rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

This language, giving the reasons of this Court for affirming a decree of the Circuit Court, sustaining a demurrer to the bill and dismissing it on the merits, was used where the bill sought to revise the action of the Board of Commissioners of Private Land Claims in California, and a decree of the District Court of the United States, affirming the conclusion of the commissioners on the ground that these

decrees were obtained by fraud. *The character of fraud alleged was that the prevailing party in the proceedings before the Commissioners and in the District Court sustained his title there by using documents falsely and fraudulently antedated, so as to appear to have been made at a time when the official executing them had authority to act;* it not being shown that the representatives of the government, who were opposing the relief sought by the claimant in the original proceedings before the commissioners and the District Court had assisted or connived at the fraud, or were in any respect recreant to their duty. It appeared from the history of the former proceedings, that the necessity of the claimant's exhibiting such a paper had been made obvious to the Board of Commissioners, the claimant, and the attorneys representing the government by a report of the Surveyor General, and that the attention of all the parties and of the Court was thereby drawn to a close scrutiny of any proceedings taken to supply this important document, and that after it was produced, ample time had existed before the rendition of the decrees complained of to make all neccessary inquiries into the validity of the documents.

The decision refered to, besides being commended by reason, refers with unqualified approval to an opinion delivered by Mr. Chief Justice Shaw in Green vs. Green, 2 Gray (Mass.), 361. as being the best discussion of the whole subject, and endorses particularly this language of that eminent judge:

> "The maxim that fraud vitiates every proceeding, must be taken like the other general maxims, to apply to cases where proof of fraud is admissible; but where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible. The party is estopped to set up such fraud, because the judgment is the highest evidence and cannot be contradicted."

In the Throckmorton case, the government actually be-

lieved the evidence offered by the claimant to be genuine, and made no controversy with reference to same, and its fault was that of negligence only in not raising an issue that could have been raised. But in the present case, the alleged fraud was actually tried, and the very evidence now assailed as false was fiercely attacked as false in the law action.

I.

INTRINSIC FRAUD.

The fraud alleged in the Throckmorton case was held to be intrinsic fraud, the Court saying, that the genuineness and validity of the concession to the claimant was the single question pending before the Commissioners and the Court for four years, and this was so, notwithstanding no issue on the point was in fact made. It was the thing, and the only thing, that was controverted, although the forgery was not actually suspected, and it was essential to the decree. To overrule the demurrer to this bill would be to re-try * * * the very matter which they tried on the ground of fraud in the document on which the decree was made.

An illustration of extrinsic fraud sufficient to justify an application to equity for relief is found in Pacific Railroad of Missouri vs. Missouri Pacific Railway Company, 111 U. S. 505, in which a former decree of the Circuit Court of the United States for the Eastern District of Missouri was successfully impeached and vacated upon the ground that the representatives of the unsuccessful party had been fraudulently procured by the successful parties to permit a decree to be obtained contrary to the equities of the case; that no adequate pleadings had been filed; no reference made to a Master for examination; no defense undertaken to be interposed at any stage; that the cause was hurriedly disposed of without waiting for the expiration of the usual time for taking proof,

and that the decree was collusive. Mr. Justice Blatchford delivering the opinion of this Court, citing United States vs. Throckmorton, says (p. 520):

> "On the admitted allegations of the bill there was *no real defense* made in the Ketchum suit, and the present plaintiff was prevented from making that defense by the unfaithful conduct of its solicitor, and its directors and the directors of the Atlantic Company. A case of that kind is one of which a court of equity will take cognizance."

The terms, intrinsic and extrinsic, in their present connection, are further defined and contrasted in Pico vs. Cohn, 91 Cal., 129, which is one of the most carefully considered decisions in the books on this subject: Pico owned lands in Los Angeles of great value, which were mortgaged in considerable sum. To prevent their sacrifice under foreclosure, he obtained a loan from Cohn, giving Cohn as security a mortgage, taking the form of an absolute grant of the encumbered property. Shortly therafter Pico procured necessary funds, and tendered Cohn the amount of his loan, with interest, and demanded a re-conveyance, which was refused, Cohn contending that the transaction was not a loan, but an absolute sale. Upon a suit being brought, the Court found for the plaintiff and decreed a re-conveyance upon his repaying amounts loaned. Afterwards, the Court granted a new trial, and upon the re-trial a decision was reached for the defendant and affirmed on appeal. Suit was soon afterwards brought to annul the decree last mentioned, and it was stated to have been procured by reason of the fraud of Cohn in his preparation of the form of security, and in his representation to Pico that the transaction was correct, Pico being very old and unable to speak or understand English, and unused to complicated transactions; *and in Cohn's subordination of perjury with respect to a witness named Johnson, called by the plaintiff to testify in the belief that Johnson, who knew the facts and*

had repeatedly stated them consistently with plaintiff's claims, would tell the truth; that before using Johnson as a witness, they had no reason to suspect that he would testify falsely, and had no evidence of bribery. It is alleged that since the trial, which resulted in the adverse judgement to Pico, he had discovered the fact of Johnson's bribery and the reasons for his perjury, and it was admitted that Pico had been duly diligent in the premises, and that there was a reasonable certainty that upon another trial, if granted, Pico would gain his cause. Justice Beatty, speaking for the Court, says:

> "Such being the case, is plaintiff entitled to a decree, vacating and annulling the former decree on the ground that it was procured by fraud? After a careful and extended examination of the authorities, we are constrained to answer this question in the negative. That a former judgment or decree may be set aside or annulled for some frauds, there can be no question, but it must be a fraud extrinsic or collateral to the questions examined and determined in the action, and we think it is settled beyond controversy that the decree will not be vacated, merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation, and when parties have once submitted a matter, or have had the opportunity of submitting it for investigation and determination, and when they have exhausted every means of reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed on, or that the prevailing party by some extrinsic or collateral fraud has prevented a fair submission of the controversy. What then is an extrinsic or collateral fraud within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from court by false promise of a compromise, or purposely keeping him in ignorance of the suit, or where an attorney fraudulently pretends to represent a party and connives at his defeat, or being regularly employed to represent him, sells out his

client's interests. In all such instances, the unsuccessful party is really prevented by the fraudulent contrivance of his adversary from having a trial; but when he has a trial, he must be prepared to meet and expose perjury then and there. He knows that the false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that necessarily the truth or the falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him, on motion for new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong in such case is, of course, a most grievous one, and no doubt the legislature and the courts would be glad to redress it, if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied.

"But counsel seek to distinguish this case from those in which it has been held that a judgment will not be set aside by reason of its being based upon forged documents or perjured testimony. *They say that the fraud committed by Cohn was the bribing of Johnson, that this was collateral and extrinsic; that it was not and would not have been the subject of investigation at the trial of the original action.* We do not think this distinction can be maintained. *The fraud which Cohn committed was the production of perjured evidence in support of his defense. The means by which he induced the witness to swear falsely was but an incident.*"

In this case, one of two things has been done, if the complainant is to be believed: Mrs. Smythe, either (1) put in evidence false circumstances; or (2) failed to disclose to her adversary material facts within her knowledge. In either case there is nothing collateral to the issues in the case.

The language in Pepin vs. Lautman (Ind.), 62 N. E. Rep., p. 60, is likewise a good statement of the distinction between intrinsic and extrinsic fraud:

"It is quite true that the ancient maxim, 'Fraud vitiates everything,' applies to a judgment as well as to a contract, but this maxim can apply only in cases where proof of fraud is admissible. It is also true that a false affidavit by a party or a fraudulent instrument might be so used in the pending suit as to amount to fraud, but the distinction must be kept in view between suits, asking to set aside the judgment obtained directly by fraud, and to set aside a judgment founded upon a fraudulent instrument or perjured testimony. In the former the trial court was prevented by some matter outside of the issue actually tried from reaching the merits of the case, while in the latter the court is asked to re-try a matter in issue, and which was, or might have been, actually contested in the former trial. If the unsuccessful party is by any false promise kept away from court or kept in ignorance of the suit, or is represented by an attorney who fraudulently connives at his defeat, or corruptly compromises his interests, he may be relieved from the judgment so obtained, because these are not matters submitted to the court in the actual trial of the case on its merits. The perjured testimony was in a sense a fraud upon the opposite party, but that matter was itself before the Court and was actually involved in the trial which resulted in a judgment, which is itself the highest evidence. It is not the policy of the law to re-try a case betwen the same parties, where in a former suit, they were present in court and subject to its jurisdiction, and the claims of the parties in a matter within the court's jurisdiction were presented to and considered by the court. The party present at the trial must be prepared to meet and expose perjury, because he must know that in no other way can a false claim be supported, and the purpose of the trial is to ascertain the truth, and in doing so the court must determine the truth or falsity of the testimony given."

As illustrating the general principle, and its particular application to cases of perjured testimony, conspiracies to make the facts appear otherwise than they are, the use of forged documents, the creating of a false appearance of cir-

cumstances with intent to deceive, the non-production of evidence that would have been material to the opposite party, the suppression and concealment of facts, and other cases of intrinsic fraud, note also the following:

Homer vs. Fish, 1 Pick, (Mass.), 435;
United States vs. Gleason, 90 Fed. Rep., 778;
Friese vs. Hummel, 26 Ore., 145;
Smith vs. Lowry, 1 Johns Ch., 320;
Green vs. Green, 2 Gray (Mass.), 361;
Cotzhausen vs. Kerting, 29 Fed. Rep., 821;
S. C., 140 U. S., 678;
Hilton vs. Guyot, 159 U. S., 207;
Vance vs. Burbank, 101 U. S., 514;
Steele vs. Refining Co., 106 U. S., 447;
Dixon vs. Graham, 16 Ia., 310;
Haas vs. Billings, 42 Minn., 63;
Loucheine vs. Strauss, 49 Wis., 623;
Moffatt vs. United States, 112 U. S., 24;
United States vs. Minor, 114 U. S., 233;
Gray vs. Barton, 62 Mich., 196;
Amador Company vs. Mitchell, 59 Cal., 179;
United States vs. White, 17 Fed. Rep., 561;
United States vs. Hancock, 30 Fed. Rep., 858;
Maryat vs. Hampton, 7 T. R., 269;
Richards vs. Symes, 2 Atk., 319;
Sewel vs. Freestone, 1 Ch. Cases, 65.

The dictum of Lord Justice James in Flower vs. Lloyd, Vol. 10, L. R., Chancery Div. (A. D. 1878), is pertinent: It appears that the particular fraud there charged was that when controversy had arisen between the parties, an agreement had been reached, that one might employ an inspector to examine the other's printing apparatus: that this examination was made, but that the proprietors had so shifted and juggled the lithographic stones as to deceive the inspector, and that by

reason of this fraud in the physical arrangement of the printing plant, the expert had honestly given false testimony at the hearing to the prejudice of the complaining party.

> "Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants, *sui juris* and at arm's length, could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or that a misleading production of documents, or of a machine or of a process had been given? There are hundreds of actions tried every year, in which the evidence is irreconcilably conflicting, and must be on one side or the other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favor, the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witnesses and subordination of perjury, and so the parties might go on alternately, *ad infinitum*. There is no distinction in principle between the old common law action and the old chancery suit, and the Court ought to pause long before it establishes a precedent, which would or might make in numberless cases, judgments supposed to be final, only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely, but in their desire to prevent parties litigant from obtaining any benefit from such fraud to himself, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils, not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds."

There remains in this connection the inquiry whether this suit presents error, intrinsic or extrinsic. In substance, the claim is that Hunter is not dead, and that Mrs. Smythe ob-

tained judgment at law by conspiring with Hunter to cause his disappearance to appear to be a case of drowning, and that she corruptly denied her guilty knowledge of his survival of that experience, and corruptly concealed her fraud from the insurance company, and the Court and jury, trying the law action, with the result, that although the insurance company was convinced the claim was fraudulent, and although it all but moved heaven and earth in its search for Hunter, and although, in its zealous efforts to convict Mrs. Smythe of maintaining a fraudulent suit against it, it subjected her to experiences such as few women, even if innocent, could have endured, and although it had its day in court upon the very issue of fraud tendered by this bill, was represented by able counsel, and supported its case by evidence with which it was satisfied to announce ready for trial, and did announce ready, speculating upon the verdict; and although it presented its motion for new trial, insisting the issue was decided erroneously, and afterwards was allowed a hearing upon the merits in the highest court of the land, and the issue was there re-investigated; yet now, because its general agent, its paid inspector and one or two other witnesses, of whose character we know nothing, say that Hunter is alive, it is to be permitted to re-open the case, and re-try in equity the issue of fact which was decided against it at law. If this is done, then the defendants may in turn inquire whether or no there be a conspiracy between Brown, Milliken, et al., and if so, force another trial of the issue so long as the courts may remain open.

The fraud complained of is, as matter of necessity, intrinsic. The insurance company was not misled nor deceived; it was not kept from Court; its attorneys were incapable of lack of fidelity to its interests, and displayed conspicuous zeal in their defense of the case. It knew that the issue was to be tried before the action was even commenced; it had

its inspector collecting evidence before a claim even was filed with it; it decided in the beginning that its opposition to the case would rest upon claim that Hunter and his sister were conspiring to defraud, and to that end its inspector sought to entrap Mrs. Smythe into a confession of complicity, and to bulldoze her into surrendering the Hunter policies. The pleadings adequately made the issue; the Court permitted all evidence bearing upon it to be adduced, and the charge left the jury free to act upon the evidence of the insurance company, if convinced of its truth.

There is no difference in principle between supporting a case by a forged paper and supporting it by forged circumstances. There is no difference between causing a witness to speak falsely and causing an inanimate object to speak falsely. There is no difference between conspiring to make out one's claim by the combined perjury of several persons, and supporting it by a combination of manufactured physical appearances.

The detailed facts, showing the issues tried at law and the issue here presented are set out under the third section of this brief, and are not therefore reproduced here. The Court's charge, and the special charges, are shown in appendix.

EXTRINSIC FRAUD.

From a careful examination of the authorities relied on by the complainant, the supposed equity of the bill, we have reached the conclusion that they do not support its position.

Marshall vs. Holmes, 141 U. S., 589, in no manner conflicts with the doctrine for which we contend, as this Court by clear implication has held. The point of law involved in the Marshall vs. Holmes case was, whether, after a petition and bond had been filed in a State Court for the removal of the cause to the Circuit Court of the United States, the

State Court, notwithstanding such proceedings, retained authority to consider the equity of the bill. This Court held, in accordance with the all but universal current of judicial opinion, that upon the filing of the petition and bond for the removal, the State Court had no authority to proceed further, but the merits of the case thereupon became cognizable only in the Federal Court. The opinion closes with this language:

> "The suit being in its general nature one of which the Circuit Court of the United States could lawfully take cognizance, it was for that Court, after the cause was docketed there and upon final hearing, to determine whether, under the allegations and proof, a case was made, which according to the established principles of equity entitled Mrs. Marshall to protection against the judgments alleged to have been fraudulently obtained."

The general expressions in that case, even if the jurisdiction of equity had been involved, are not in the slightest degree inconsistent with the statements made in the authorities which we have presented, and that the Court did not intend to limit United States vs. Throckmorton is manifest from the fact that the latter case is cited approvingly. The very point of supposed conflict between these two decisions of this Court has been several times urged upon this Court by disappointed litigants, and this Court has been urged each time to declare the fact of such conflict and depart from the principles announced in the Throckmorton case, and the long line of decisions following it. Thus, in the certificate presented to this Court in Graver vs Faurot, 162 U. S., 435, the United States Circuit Court of Appeals for the Seventh Circuit suggested such conflict and the necessity of having this Court resolve the doubts arising therefrom, and this Court, while refusing to entertain jurisdiction, does not even intimate that there existed any difference in the principles of the cases criticised.

Again, in Bailey vs. Sundberg, 49 Fed. Rep., 583, opinion rendered by the Circuit Court of Appeals for the Second Circuit, Judge Wallace, speaking for the Court, denied relief similar to that sought here, and notwithstanding the libellant twice applied to this Court for certiorari upon briefs urging the apparent conflict between United States vs. Throckmorton and Marshall vs. Holmes, his applications were denied. (145 U. S., 628; 154 U. S., 494.)

Again, as indicating that in the Bailey vs. Dundberg case, the Court of Appeals appreciated and passed upon the very point here at issue, we refer to United States vs. Gleason, 90 Fed. Rep., 778, in which Judge Lacomb, speaking for that Court, after reviewing the decisions supposed to be in conflict, reaches the conclusion that there is no conflict between the decisions referred to, and the Gleason case is disposed of upon the authority of United States vs. Throckmorton.

It is to be remarked, also, in this connection, that when this Court declined to entertain jurisdiction of the case of Graver v. Faurot, upon the certificate presented by the Circuit Court of Appeals for the Seventh Circuit, that Court thereupon disposed of that case upon its merits by distinguishing the facts then before it from both United States vs. Throckmorton and Holmes vs. Marshall, *and planted the disposition of that appeal upon the principle that there had been no trial at equity, because the successful party in the decree there sought to be vacated, had through his fraud prevented the joining of issues, and deceived his adversary into believing that there was no issue open for litigation,* and it further makes distinction between the principles applicable to the ordinary bill in equity seeking to re-open an action at law, upon points that would have been available in the defense at law, and suits in equity, where, under authority of law, the plaintiff calls upon the respondent to make a discovery of

facts within his knowledge pertaining to the rights of complainant. This distinction, whether valid or not, shows that in that case the Court of Appeals was seeking to bring the case then before it within the rule of extrinsic fraud, and to keep it out of the operation of the rules applicable here. No further comment is necessary upon the three references to Graver vs. Faurot than the simple statement outlined above as to the grounds upon which they were disposed of.

Crim vs. Handley, 94 U. S., 652, was decided prior to the Throckmorton case. The bill was dismissed in the Circuit Court for want of equity, and the action of the lower Court was affirmed in this Court. The ground of the Court's action was in substance that the party had had his trial, and was not entitled to a re-examination of same under the facts stated. In the course of the discussion of the points involved, the Court enunciates many well settled equitable principles relating to bills for new trials, and the reasons why, before the present liberality in granting new trials at law obtained, equity formerly exercised a wider jurisdiction than now, in enjoining judgments; but it is said:

> "It may with equal safety, be laid down as a general rule, that a defense cannot be set up in equity, which has been fully and fairly tried at law, although it may be the opinion of the Court, that the defense in the suit at law ought to have been sustained."

The rule deducible from this and the other authorities is that courts of equity may exercise jurisdiction to enjoin a judgment, where the injured party has an equitable defense which could not be asserted at law, or where it appears that this defense could have been made at law, but the injured party was prevented from making it by fraud of his adversary, mistake, or unavoidable accident, unmixed with any fault or negligence on his part. This statement does not undertake to define fraud that is available, where the defense was one

that could have been made at law, but the injured party did not make it. The effect, therefore of this general statement is not to illumine the present discussion, and it remained for the later cases, beginning with the Throckmorton case, to define what fraud was available, and sound principle then required that the distinction which has ever since obtained between extrinsic and intrinsic fraud should be made.

Maddox vs. Apperson, 14, Lec., (Tenn.), 596, *was likewise a case where the bill was held to be without equity, and accordingly dismissed.* There is nothing in that decision supporting the position of the complainant, though it may be remarked in passing, that Judge Freeman, in speaking for the Court in that case, denies the validity of the distinction between extrinsic and intrinsic fraud, in which position he goes counter to the views of this Court, as well as most of the other courts of last resort in the various State jurisdictions.

Marine Insurance Company vs. Hodgson, 7 Cranch, 322, was decided in 1813. Justice Marshall, speaking for this Court, *refused to recognize any equity in a bill for a new trial, asserting a legal defense which was actually made in the trial of the law case.* Manifestly, such a decision is of more weight on the respondent's side of this controversy than on that of the complainant.

Insurance Company v. Bangs, 103 U. S., 780, was a case in which the bill charged fraudulent conspiracy to rob an insurance company by means of causing it to issue policies on the life of an intended suicide, which conspiracy afterwards resulted in the suicide of the insured as contemplated. The company sued to cancel the policies and obtained a decree, which in the action at law to recover on the policies was held to be void, because of being against an infant defendant, over whom the Court had not obtained jurisdiction, and

judgment thereupon went for the plaintiffs seeking to recover on the policies. Afterwards a second suit in equity was brought to enjoin the judgment for plaintiffs in the law action, and this Court denied the relief sought, saying through Justice Field, that the alleged fraud and conspiracy, incident to the issuance of the policies could have been made available as matter of defense in the law action and that not having been so presented, *equity would not re-examine and re-try the case, after the company had had its opportunity at law of making the defense.* It is manifest that decision does not sustain the present bill.

In Wonderly v. Lafayette County, 150 Mo., 635, a judgment at law was assailed in equity on the ground that it had been obtained because of the fraud of the real plaintiff in bringing his suit in the name of a party not really interested in the controversy, whose citizenship was such as to confer jurisdiction on the Federal Court, which strategem, it was averred, was not suspected by the defendant in the law action and was not involved in the controversy, but was in effect a fraud upon the Court, as distinguished from a fraud upon the adverse party. The Court, finding the plaintiff to have committed the fraud upon the jurisdiction of the Court, held, under the circumstances of the case, such fraud to be distinguishable from *fraud intrinsic to the cause of action as such, its merits, enforceability, etc., and sustained the bill, being careful, however, to point out that the Supreme Court of Missouri was definitely committed to the principles of the Throckmorton case, and that the bill was sustained solely, because the Court construed it to charge a fraud in the procurement of the judgment, as distinguished from fraud in the case of action* (citing Hamilton v. McLain, 139 Mo., 638, which is one of the most luminous discusisons of the subject, and Bates v. Hamilton, 144 Mo., 14).

Fraud in the procurement of a judgment means fraud

operating upon the machinery of the court as such, or fraud operating directly upon the energies, activities and defenses of the adverse party to the suit, and does not mean fraud in the production of perjured testimony, forged documents, simulated appearances, to sustain the cause of action, or the like, as is made manifest by that decision and the authorities which are cited and stated to be not in conflict with it.

This statement of the true rule of equity jurisdiction shows, that the present application seeks to move this Court to go to much greater lengths even than has ever been allowed.

Guild v. Phillips, 44 Fed. Rep., 462, was a case in which the complaining party sought to re-open a compromise decree, which he had been led to make by reason of fraudulent representations made to him by the other party to the decree, and it involved simply the general principle, that a contract, whether of record or otherwise, to which a party has been induced to consent by fraud, may be set aside. The real legal question involved in the present record is in no manner involved there.

Ocean Insurance Company v. Fields, 2 Storey, 59, was decided at circuit by Mr. Justice Storey some thirty-seven years before the decision of the Throckmorton case. There had been a trial at law to recover the insurance upon a schooner called the Francis, which it was alleged had been lost at sea, and the defense urged was that the plaintiff has fraudulently cast her away and destroyed her. The plaintiff prevailed. Afterwards and before the judgment was paid, the insurance company discovered that the vessel had not been cast away, as was made an issue in the law trial, but that the complainant had secured augers and bored holes in the bottom of the schooner, causing her to sink. The bill for new trial was exhibited on the theory, among others, that the insurance company had not litigated *the fact of boring the*

holes in the vessel, and that it had no reason to suspect such conduct on the part of the plaintiff, and did not suspect it, and that this knowledge had been acquired after the rendition of the judgment at law. Justice Storey seems, from a careful reading of the opinion, to have been greatly in doubt, as to whether the bill could be maintained at all, but finally reaches the conclusion that it might possibly be sustained on the theory that the matter of boring the holes in the vessel had not been litigated at law, and could not have been suspected by the insurance company, and in order that the case might be developed upon the proofs, he overruled the demurrer to the bill, and reserved the cause until testimony could be taken. Among other things, he says:

> "In the present case, I am not prepared to say that the very fraud now preferred in the bill was identical with that propounded at the trial. Fraud in casting away a ship may be very distinguishable from fraud in destroying her by boring holes in her bottom. * * * * * I should say that it was not the casting away of the vessel, but the boring of holes in her bottom that was the real proximate cause of the loss and destruction of the vessel. But it is unnecessary to decide that, because upon a demurrer *in odium spoliatoris*, the Court will not decide a matter of such importance in his (the spoiler's) favor, but will reserve it for a final hearing on the merits."

It may be suggested, with reference to this decision: First, the opinion indicated grave doubts on the part of the great judge who decided it; second, these doubts were not finally disposed of by him, but the case was reserved for development, and we are not advised what final disposition was made of the case at circuit or on appeal; third, the defense was one not available to the insurance company at law, because the vessel, which was the only available evidence of the manner in which it had been destroyed, was sunk; and, fourth, the issue had never been litigated at law, and therefore, there was no re-examination of an issue previously litigated presented to the Court for examination.

Stowell v. Ellred, 26 Wis., 505, holds that *the perjury of a plaintiff*, who is called to testify as a witness for the defendant, amounts to *such fraud upon the defendant* as to justify setting aside the judgment at law. The case is not fully reported, but seems to rest wholly upon the proposition, that if the plaintiff perjures himself in the trial of a law action, that in itself affords grounds for the interposition of equity. We need make no reply to such a proposition at this stage in the history of our jurisprudence.

Trefz v. Insurance Company, 8 Fed. Rep., 177, opinion by Nixon, district judge, holds in effect, that an insurance company, which had made a defense at law to an action brought to recover upon policies of insurance, that the insured was an habitual drunkard, in violation of the terms of the policy, and which had gone to trial on that issue, without having adequate proof to sustain its plea, might afterwards, on securing this proof, enjoin the enforcement of the judgment at law. This, if true, would render unnecessary any real preparation for the trial of actions. A defendant who really prefers to litigate the issue at equity, may go to trial at law upon insufficient testimony, take its chances speculating on getting a verdict, and, if unsuccessful, then renew the controversy on the equity side of the docket. Such a rule cannot be correct, and that it is not, is established from the fact, that it has, so far as we have been able to discover, never found expression in any other authority than the case cited.

The Fraker cases referred to at p. 88 of the complainant's brief, appear never to have passed the trial court, and, moreover, present the same question as is involved in the Guild v. Phillips case above, to-wit: A compromise judgment obtained through the fraud of the beneficiary thereunder. This is the construction put upon the judgment mentioned when the Fraker case is under review in Hunter v. State, Tex. Crim. App., p. 98.

Where fraud has been shown, the immediate inclination of the Court is to right the wrong, if possible, but such a desire may make exceeding bad law. This reflection is especially important where the complaining party, in his headlong pursuit, seeks to visit the consequences of a wrong done him upon the innocent as well as the guilty.

FOUR.

The Equities of the Appellees.

I.

Mrs. Smythe and her brother, W. A. Hunter, in 1896 were respectable and reputable residents of Pecos, Texas, a little county seat in the Western and arid portion of the State. They were members of a family of Hunters living in Licking County, Ohio. The family had extensive connections and numerous constituents, and its standing in Ohio was substantial. So far as known, no suggestion had ever been made against any member of the connection imputing any want of integrity. Mrs. Smythe had originally removed to Western Texas with her husband, who was an attorney, and her brother, W. A. Hunter. Hunter and Mettler purchased from the State certain sections of school land in Loving County, adjacent to the county of which Pecos was the principal town, and had engaged in an attempt by means of irrigation, to develop the lands. The enterprise proved to be a disastrous one, and after losing some money in it, Mettler died, leaving his widow surviving. In order to sustain herself, she became a seamstress, but continued to enjoy and apparently to merit the confidence and respect of her friends and acquaintances in Pecos.

When W. A. Hunter disappeared on the occasion of his trip from Pecos in December, 1896, the circumstances strongly tended to show that he had been drowned. Pecos being

a small town, and the disappearance presenting rather unusual circumstances, interest was aroused and a great many of the citizens took occasion to visit the scene of the supposed drowning, and to remark upon the probabilities of that theory. The result of this interest found expression in the general belief of the community that Hunter had in fact lost his life, as indicated. It appears that only one man in the community entertained a different opinion. He was a saloon man named Johnson, and his candor was suspected, because of his having been brought under the influence of a somewhat unprincipled inspector in the employ of the insurance company shortly after Hunter's disappearance.

When Mrs. Smythe began to take steps towards winding up her brother's affairs, she learned through one of the bankers of Pecos, that some of her brother's papers were lodged with the bank for safe-keeping, and upon examination, the insurance policies in the complainant company on Hunter's life, in her favor, were found. The finding was to all appearances a surprise to Mrs. Smythe, but being of course gratified at this evidence of her brother's foresight in her behalf, she took the advice of her banker friend, Mr. R. D. Gage, a citizen of excellent standing, formerly a member of the State Senate, a retired attorney, and a man of means, and under his suggestions, prepared, with the assistance of the inspector of the Insurance Company, proofs of death under the policies. The inspector, in rendering such assistance, at first suggested no lack of confidence in the claim, but after securing from her and witnesses all of the affidavits practicable, notified her that the company regarded the claim as fraudulent, sought to entrap her into a confession of complicity in the fraud, and declined payment.

Mrs. Smythe thereupon again consulted with Senator Gage, and being advised by him to commence suit at some point where trial would be convenient, when the Insurance

Company removed the cause into the Federal Court, as it was expected to do, finally Dallas was agreed on, and Senator Gage advised Mrs. Smythe to go to Dallas, and there employ competent counsel, recommending to her the law firm of Alexander, Clark & Hall, having confidence, not only in the ability of that firm, but having been the personal friend for years of William H. Clark, a member of said firm, and some time President of the Texas State Bar Association.

Mrs. Smythe, taking this advice, went to Dallas, and employed said firm, and at or about the time of said employment, Mr. Clark of said firm made a personal visit to Pecos, and there investigated at first hand the local evidences of Hunter's disappearance, conferred with a representative number of the leading citizens and with Senator Gage, learned of the unusual, not to say unprincipled, conduct of the inspector who went to Pecos on behalf of the Insurance Company, when it had notice of Hunter's death, and reached the conclusion that Hunter had undoubtedly been drowned.

At the time of the employment of this law firm, Mrs. Smythe under date of October 27, 1897, evidenced in writing the said contract of employment in the following language, (omitting recitals):

> "The premises considered, I, Mrs. Jennie M. Mettler, a *feme sole,* of Pecos, Reeves County, Texas, hereby employ Alexander, Clark & Hall, of Dallas, Texas, to institute and prosecute suit against said Insurance Company upon said policies, I being the owner and holder thereof, in such court as they may deem advisable. It is understood, that said Alexander, Clark & Hall will institute and prosecute said suit for a contingent fee of one-third of the amount recovered upon said policies.
>
> "It is further understood and agreed that should any proposition of compromise be made in the premises, that the same is to be submitted by said Alexander, Clark & Hall to said Mrs. Jennie M. Mettler before the same is

accepted; that is, the said Mrs. Mettler is to sanction and authorize any compromise made.

"It is understood and agreed that for and in consideration of the legal services rendered, and to be rendered, by the said Alexander, Clark & Hall, this instrument conveys to the said Alexander, Clark & Hall an undivided one-third interest in said policies" (Rec. p. 202).

Under their employment, Alexander, Clark & Hall made numerous fruitless attempts to compromise the claim, making various offers; among others, to take one-half on condition of prompt settlement. Being unable to secure any settlement, they filed suit upon the policies on behalf of their client in December 2, 1897, in the District Court of Dallas County, Texas. In due course, the defendant removed the proceedings to the Circuit Court of the United States in and for the Northern District of Texas, at Dallas, and the cause remained there until it was finally disposed of by trial and writ of error to this Court.

The preparation of this cause for trial proceeded and a great amount of testimony was taken. The defendant persisted in its contention that Hunter was not dead, and besides, evidently depended in the preparation of the case for trial upon some technical defenses, in addition to the contention that Hunter was not dead.

In the meantime, the law firm of Alexander, Clark & Hall was dissolved, W. L. Hall retiring, but retaining his professional relation to and interest in Mrs. Smythe's action, and a new firm was constituted, to-wit: Alexander, Clark & Thompson; and on June 10, 1899, Mrs. Smythe executed a new contract with the new firm of Alexander, Clark & Thompson and W. L. Hall, reciting that the prosecution of the action upon the insurance policies involved more onerous services than originaly contemplated, and that the new contract of employment was to be considered as in lieu of

and in substitution for the original contract or "power of attorney."

The new contract (omitting recitals), stipulated:

"That I. Jennie M. Mettler, the present owner of said policies, hereby ratify my said employment of said attorneys, and do now employ them, the said Alexander, Clark & Thompson, and W. L. Hall; and it is understood and agreed that said Alexander, Clark & Thompson and W. L. Hall will continue to prosecute said suit as in their judgment they may deem proper, and in consideration of the legal services rendered and to be rendered in the collection of said policies, by suit or otherwise, they are to receive and are hereby given, transferred, assigned, and delivered one-third interest of, in and to said policies and claim against said Life Insurance Association, and the further sum of $2,500.00 thereof, that is, should the principal, accrued interest and 12 per cent. statutory damages, if allowed, amount to $18,000.00 and be collected, they would own and receive $8,500.00 thereof; as well as the attorneys' fees provided for by the statutes of Texas in such cases; and should a less amount on account of principal, interest and said 12 per cent. damages be collected by suit or compromise, they would own and should receive their pro rata part thereof, according to their interest aforesaid, as well as said attorneys' fees, if any, collected; it being understood that on account of the decision in G., C. & S. F. Railway Company v. Ellis, 165 U. S., 150, it is very probable that a recovery of 10 per cent. attorneys' fees, as well as of the 12 per cent. damages cannot be enforced.

"It is further understood that said Alexander, Clark & Thompson, and W. L. Hall, may employ such associate attorneys to aid them in the prosecution of said suit as they may deem necessary, it being agreed that they are to pay such attorneys themselves, and the said Mrs. Mettler is not to be held liable for attorneys' fees other than provided above" (Rec. p. 200).

In contemplation of securing the authority indicated in the contract just quoted, to employ associate attorneys, or in

pursuance of that contract, Alexander, Clark & Thompson and W. L. Hall, in the spring or summer of 1899, employed Mr. M. A. Spoonts, an attorney of the Fort Worth, Texas, bar, general and local attorney for several railway interests and also an ex-President of the Texas State Bar Association. This arrangement was made through Mr. Clark, and at the time of the employment of Mr. Spoonts, no stipulation as to the fee which Mr. Spoonts was to receive was made; that is, the amount of his fee was left open. Mr. Spoonts, after his employment, actively assisted in the further preparation of the case for trial, and rendered the services covered by his employment. It may be proper to remark here, that the employment of Mr. Spoonts was never evidenced in writing.

On May 28, 1900, the trial of the law action was begun in the Circuit Court at Dallas. After contest, covering several days, indicating that both plaintiff and defendant had developed all the strength of which they were, respectively, capable, a verdict was had on June 2, 1900, in favor of plaintiff, for principal, interest, damages and attorney's fees. The issue of Hunter's death, *vel non*, was the one about which the case turned. The sharp cross-examination of Mrs. Smythe, the insistance by the insurance company upon circumstances indicating that the disappearance was a fraud, and that Mrs. Smythe was in the conspiracy, coupled with the testimony of several witnesses, who claimed to have seen Hunter in the flesh after his alleged drowning, indicate in gross the theory of the insurance company, plaintiff contenting herself with putting in proof all of the circumstances surrounding his disappearance, and contending that the effect of these combined circumstances was to force the conclusion that Hunter was drowned, as claimed.

The conflicting theories of the case were fully presented by the Court in its charge to the jury. In due course, a motion for a new trial was presented and overruled, several

of the specifications of error relating to the issue of Hunter's death, and raising questions of law as to the sufficiency of the evidence to support the verdict. The motion was overruled, and writ of error taken to this Court, the Tenth Assignment of Error urged by the present complainant, as plaintiff in error in that proceeding, being to the effect that the verdict upon the critical point of Hunter's death, was without support in the evidence.

After Mrs. Smythe obtained the judgment against the insurance company, which has been described, William H. Clark having in the meantime acquired the interests of W. M. Alexander, Wm. Thompson and W. L. Hall, his former associates in the case, and being indebted to the Phillips Investment Company of Kansas City, Missouri, in the sum of $1,471.57, balance due it upon monies borrowed upon certain real estate, a transaction wholly independent of this controversy, and desiring to secure that company in the payment of its indebtedness to it, sold and assigned to said company as collateral, his interest in the judgment mentioned, providing, however, that upon collection by the investment company of his note, the hypothecation contract should terminate, and his interest revert. It was further stipulated in said contract, that same should not, in any way, interfere with W. H. Clark in his conduct of the litigation as leading counsel in Mrs. Smythe's behalf. (Rec., 197.)

Mr. Clark acquired said interests of his said former partners in the division of their law business when the partners dissolved, and yet appellant would leave him without restitution.

William H. Clark employed Senator Culberson, an attorney, duly enrolled in this Court, to assist in the presentation of the cause here, agreeing to pay him as fee for his services, contingent, however, upon ultimate success of the suit, the sum of $1,000.00, $500.00 of which was to be paid

by the client, Mrs. Smythe, and $500.00 by Mr. Clark. To evidence this contract of employment, on December 30, 1901, Mrs. Smythe and Mr. Clark agreed in writing with Senator Culberson, as follows: (Omitting recitals.)

> "Premises considered, we the said Mrs. Jennie M. Mettler, a *fem sole*, and W. H. Clark, her attorney, the owners of said judgment, hereby employ Charles A. Culberson of Dallas, Texas, now temporarily residing in Washington, D. C., to brief said case for and in behalf of the said Mrs. Jennie M. Mettler, defendant in error, and to orally argue said case for her on the submission thereof in the Supreme Court; and for and in consideration of such services rendered and to be rendered by him, we hereby give, transfer and assign to him, said Charles A. Culberson, an interest of one thousand ($1,000.00) dollars in and to said judgment, and also the cause of action, that is, policies of life insurance sued upon. It is understood that the payment of said fee is contingent upon recovery upon said policies. It is further understood that five hundred dollars of said one thousand dollars is to be paid out of the interest of the said Mrs. Jennie M. Metzler in said suit, and that the remaining five hundred dollars is to be paid out of the interest of said William H. Clarke therein, and that the one is not to be responsible for the portion to be paid by the other; that is, each one undertakes to pay said Charles A. Culberson five hundred dollars, as aforesaid." (Rec., 70, 71.)

When this contract was made the case was pending, as has been stated, in this Court, the questions involved being purely whether prejudicial error had been committed in the trial court that could be availed of by the plaintiff in error. Briefly stated, the questions presented were four in number, as is manifest from an inspection of the Record in this Court of the disposition of that writ of error. Among the questions involved was one relating to the constitutionality of the Texas statute, providing for penalties and at-

torney's fees in certain causes in suits upon life insurance policies, and one to the effect that the verdict finding Hunter dead was without support in the evidence.

No reversible error was found in the judgment, and it was accordingly affirmed on May 5, 1902, and the claims of the plaintiff in error, so persistently made and bitterly supported, to the effect that Hunter was alive, settled adversely to it in the most conclusive possible way.

On May 29, 1902, the plaintif in error drew its draft in favor of J. H. Finks, clerk of the United States Circuit Court, in the sum of $24.028.25, reciting upon the face of the voucher: "In full judgment in the case of Mettler vs. Fidelity Mutual Life Association, with interest thereon to June 4, 1902," and forwarded the same to its Dallas representatives. This voucher was placed in the registry of the Circuit Court on June 2, 1902. J. H. Finks, the clerk, and official in charge of such registry, endorsed this check to the order of E. J. Gannon, cashier of the American National Bank of Dallas, and deposited same in that bank to the general credit of the account with that bank of the United States Circuit Court at Dallas. The check was treated as cash, in so far as to credit being given by the bank to the Circuit Court account; and after such credit, it was forwarded by the American National Bank for collection, and paid through the Farmers & Mechanics' National Bank of Philadelphia on June 6, 1902.

On June 3, 1902, the fund in the registry of the court was, under order of the Court, paid out to the order of Mrs. Smythe, as will be presently explained, receipts were taken and the proceedings terminated.

Up to this time mandate from this Court had not issued, nor been filed in the Circuit Court at Dallas, nor had any process to enforce the judgment been applied for on behalf of any party at interest. On June 6, 1902, mandate

did issue from this Court. At that time the judgment was *functus officio,* having been fully discharged. The mandate was filed in the Circuit Court on June 17, 1902. We may assume that inasmuch as no one was then interested in the mandate, it must have been issued by the clerk of this Court without particular application having been made therefor.

The clerk of the Circuit Court testified that the judgment mentioned was paid through his office June 2, 1902, by means of the draft of the insurance company above described and his banking the same and disposing of the proceeds. No actual cash was handled. The Circuit Court had its general account at the bank, and through this general account made all disbursements attaching to the Circuit Court, and no special account at the bank was opened for Mrs. Smythe's case, nor were the proceeds of the voucher of the insurance company kept separate from any other funds to the credit of the Circuit Court account in said bank.

The contracts of employment of Alexander, Clark & Hall, and Alexander, Clark & Thompson and W. L. Hall, were in the form commonly used under the statutes of the State of Texas, providing for the regulation of contracts for contingent fees. They were treated, however, as matters of confidential arrangement between Mrs. Smythe and her attorneys, and notwithstanding the statutes and decisions of Texas provide for notice of such interest being given to the adverse party by filing a contract duly attested among the papers of the cause, or by giving actual notice to the adverse party of such interest, these contracts were never so filed among the papers in the cause, nor was any notice of same given to the insurance company; and at the time it discharged the judgment it was dealing solely with Mrs. Smythe, the legal and equitable owner of the judgment, and was under no obligation to take notice of, and it did not

take notice of the attorneys' said contracts. The Phillips Investment Company, it is true, had filed with the papers in the cause the hypothecation contract between it and W. H. Clark; but it is probably true that such filing was of no consequence, as it was not connected of record with the plaintiff or any other party having any record evidence of claim. The arrangement between Mr. Clark and Mr. Spoonts was entirely a verbal one, and rested in the same condition as has been heretofore described, except that after this Court affirmed the judgment in the law action, Spoonts and Clark had agreed that the former's fees should be $1,500.00. The contract under which Senator Culberson was employed was never filed in the Circuit Court, nor brought in any manner to the attention of the insurance company or the clerk of the Court in his disbursement of the monies held by him for Mrs. Smythe.

The attorney's contracts were given to and filed by the clerk after the judgment had been satisfied, to evidence Mr. Clark's authority to collect the proceeds of the judgment as Mrs. Mettler's attorney.

After the insurance company had paid Mrs. Smythe, through its deposit of funds in the registry of the Court, as aforesaid, the amount of the entire judgment against it, Mr. Clark, as her authorized counsel, came to the office of said clerk of said Court, and exhibiting his employment contracts, gave directions as to certain payments to be made out of the proceeds of the judgment before withdrawing from the registry the balance accruing to Mrs. Smythe. As showing further authority to act for Mrs. Smythe in disbursing her monies in the registry of the Court, he exhibited to and filed with the clerk a letter to him from Mrs. Smythe of date May 12, 1902. (Rec., 199.)

Acting under the authority of the powers of attorney so exhibited, and upon the authority of the letter mentioned,

the clerk disbursed the funds paid to him on account of Mrs. Smythe by drawing his checks as clerk of said Circuit Court in favor of the parties hereinafter mentioned, and delivering same to the respondents, under the following circumstances:

Senator Culberson received his fee and $26.00 expenses, through the friendly offices of Mr. C. A. Rasbury of Dallas, who acted for him under authority of a letter written him by Senator Culberson of date May 8, 1902, reading as follows:

Dear Rasbury:

"The insurance case against the Fidelity Mutual Life Association about which I wrote you some time ago, was affirmed on Monday, and in accordance with my agreement with Mr. Clark, my fee is $1,000, and is due when the judgment is paid. As I have heretofore written you, I will be glad if you will do me the kindness to collect this $1,000.00 for me, as Clark wires me to-day that the judgment will be paid in Dallas. He also owes me $26.00 for printing briefs, which please collect also, and deposit the whole sum in the National Exchange Bank of Dallas to my credit, and notify me when it is done." (Rec., 203.)

Mr. Rasbury collected Senator Culberson's fee, deposited, as he was requested to do, and as is alleged in the answer of Senator Culberson and not put in issue, same was disbursed long prior to the alleged discovery of Hunter. The fee paid Senator Culberson, as well as the $26.00 expenses, was by direction of Mr. Clark paid wholly out of the fee due him (Mr. Clark). That is to say, no part of it was charged against the balance accruing to Mrs. Smythe after Mr. Clark's fee was paid. Subsequently, however, in an adjustment between Mr. Clark and Mrs. Smythe, he charged her with his advancement of $500.00 on her account to Senator Culberson. She being liable therefor, as agreed upon. It will

be seen from the foregoing that the written evidence of Senator Culberson's employment did not at all figure in the disbursement of the fee going to him in the transaction.

M. A. Spoonts, being advised by Mr. Clark in May, 1902, that the judgment was to be paid, wrote the clerk of the Court that his interest was $1,500.00, and requested him to remit such amount to Fort Worth, when collected. He attached to his said letter of request to the clerk the letter of advice he had received under date of May 26 from Mr. Clark. The clerk testified that this payment was made to Mr. Spoonts by direction of Mr. Clark, and that it was charged against Mr. Clark's fee in the transaction.

Under instructions from Mr. Clark, the clerk paid the Phillips Investment Company $1,540.24, its hypothecation contract being already on file, no further notice was taken of same. The clerk, however, required the Phillips Investment Company to surrender the note it held against W. H. Clark for $1,471.57, and caused same to be marked cancelled, and same was filed with the other vouchers in the case. The effect of this transaction was the surrender by the Phillips Investment Company of its valid demand against Mr. Clark in the amount indicated.

The clerk further required receipts from each of the three parties above named.

After discharging the aforesaid obligations to Senator Culberson, Mr. Spoonts and the Phillips Investment Company, Mr. Clark directed the clerk to pay him the balance due on his fee, $8,346.00, and the remainder belonging to Mrs. Smythe, $11,616.00, and gave the clerk receipts similar in form to those given by the other parties at interest.

Besides the affirmative showing in the record as to the disbursement by Clark, Culberson and Spoonts of the several sums obtained by them for their services in the law action, there was neither allegation nor proof to the effect that any of

the present respondents had on hand any of the sums severally received at the time of the alleged discovery of Hunter, or of the filing of the original bill in this cause. In the absence of any such charge or proof in the present character of case, it may be assumed, the liability is predicated upon some theory other than having possession of funds which the pleader was desiring to trace, locate and recover. The facts detailed show in substance the payment to Mrs. Smythe of the full amount of her judgment against the insurance company, her payment to Mr. Clark of his fee, and his payments to Mr. Spoonts, Senator Culberson and the investment company of his several obligations to them. They are in consequence three steps removed from the insurance company. Mr. Clark occupied as favorable a position as any other creditor of Mrs. Mettler would have occupied, had she in paying their debts told them that she was paying them with the proceeds of the law judgment, and that she had finally prevailed against the insurance company, in the face of its denial of Hunter's death. As to the other appellees, the complainant might as well sue Mr. Clark's tailor, his groceryman or any other person with whom he may have conceivably had such dealings.

The settled policy of the Texas courts is favorable to contradicts for contingent fees, and it is shown in this case by the testimony of Mr. Spoonts, who, for years, has been, and is still, general attorney, as well as local attorney, for several of the most important railway systems in Texas, that the contracts with the several attorneys above mentioned are in the customary form obtaining in Texas.

James vs. Turner, 78 Texas, 243;

Hill vs. Cunningham, 25 Texas, 31;

G., C. & S. F. Ry. Co. vs. Scott, 28 S W. R., (Tex.), 457.

In 1889, by legislative act, the validity of such contracts

was expressly recognized, and provision made for giving the adverse party notice of the existence of same. In the case last cited, upon the authority of Winston vs. Masterson, 87 Texas, 200 (202), an attorney having such a contract was held to be in no sense a party to the suit, not bound even to execute any security for costs under statutory regulations imposing such obligations upon parties. It was even held in Winston vs. Masterson that a judge was not disqualified to sit in the trial of a cause in which his brother, who had a contingent interest in the cause of action, appeared as of counsel for one of the parties. We are not advised to what extent such contracts have come within the observation of the members of this Court, but an examination of the numerous Texas authorities shows that not only is the practice permitted, but it is recognized as affording to impecunious parties in many cases the only means of securing competent representation.

In the present case the complainant disclaims any liability of these respondents on the theory of wrongful conversion. It seems instead, to be seeking to rest its case upon some theory of trusteeship on the part of these respondents. Confused with this idea is that of following its funds, and should it fail in these remedies, it seems to gather comfort from the assumption that possibly respondents are liable as for money had and received. Should all these fail, then the long array of decisions about the vulnerability of judgments in the hands of assignees to equities existing between the original parties is relied on. We believe the fair and succinct statement of the facts detailed above explodes all these conflicting, vaguely defined and unsupported theories.

The Bank of the U. S. vs. The Bank of Washington, 6 Peters, 8;

Holly vs. Missionary Society, etc., 180 U. S., 284;

Merchants Ins Co. vs. Abbott, 131 Mass., 397;

Walker vs. Conant, 69 Mich., 321;
Langley vs .Warner, 3 N. Y., 327;
Stephens vs. Board of Education, 79 N. Y., 183;
Justh vs. National Bank, 56 N. Y., 483;
Webb vs. Burney, 70 Texas, 322;
Rector vs. Fitzgerald, 59 Fed. Rep., 808;
Eylar vs. Eylar, 60 Texas, 315;
McCausland vs. Pundt, 1 Neb., 211;
Steele vs. Renn, 50 Texas, 467;
Wadhams vs Gay, 73 Ill., 415;
Glover vs. Coit, 36 Tex., Civ. Apps., 104;
Gould vs. McFall, 118 Pa. St., 455;
Macklin vs. Allenberg, 100 Mo., 337.

Brief comment upon some of the cases just cited appears desirable.

In the Holley case, (180 U. S., 284), an executor, (Henry C. Thompson), holding trust funds, made payment in apparent discharge of his duty to the Foreign Missionary Society of the Episcopal Church, as directed in the will, payment being made in the form of a check drawn by said executor upon the Union Trust Company. This check was deposited by the Missionary Society in its local bank, and was in due course collected from the bank upon which it was drawn, and thereafter the Missionary Society applied the same, with other monies, to the cause of missions, before having notice of the claim asserted in the bill of complaint..

A material part of the amount so checked out by the executor to the Missionary Society, as aforesaid, was $12,000.00 in funds, which the executor, as an attorney, had received from a client, James Holley, for the purchase of real estate, which trust he had violated in paying over such sum to the Missionary Society. Holley, discovering that Thompson had misapplied said funds, gave notice to the Misisonary Society of his ownership of such funds and filed this bill. It was

admiited that the Missionary Society received the funds innocently, but as payment upon antecedent indebtedness of the executor to it. This Court, speaking through Mr. Justice Shiras, dismisses the bill of complaint upon principles pertinent to the present case, and stated as follows:

"There was nothing, either in the previous transaction or in the fact of the payment by Thompson's check to put the (missionary) society upon notice, or to have justified the treasurer in refusing to accept the payment. When Thompson's check was paid the following day, and the proceeds had gone into the bank account of the Missionary Society, the matter was fully closed between the executors of Saul's estate and the society."

"Beyond this, we think the evidence fairly shows that the Missionary Society had appropriated and expended the money so received to the purposes appointed by the testator before any notice was given of the complainant's claim. While such use and application of the money might not exonerate the society from liability, if they had received the money under circumstances that visited them with notice of Thompson's dishonest conduct towards Holley, yet if the money received in good faith by the legatee had actually and bona fide been applied and expended for the use of the beneficial purposes appointed in the will, without knowledge of Holley's claim, or indeed, that such a man existed, we think a court of equity would refuse to hold the society as a trustee *ex maleficio.*"

"This is a case in which a Court of equity is called upon to decided upon which of two innocent parties is to fall a loss caused by the dishonesty of a third person. The relation that existed between Thompson and the Missionary Society was that of executor and legatee, between Thompson and Holley, that of attorney and client. As between themselves, Holley and the Misisonary Society were absolute strangers." * * * "As against the Missionary Society, Holley, in the circumstances disclosed, had no equities, and even if it could be said that the equities were equal, a Court of equity will not transfer a loss that has already fallen upon one innocent party to another party

equally innocent."

In the present case, the relation between Mrs. Mettler and these appellees was either directly or derivatively that of client and attorneys, and the present appellees were strangers to the insurance company. They received monies voluntarily paid by the insurance company, in satisfaction of their demands against Mrs. Mettler. The claim of the insurance company that Hunter was alive had been finally settled against it, and it had evidently abandoned that position. The funds were received in due course and disbursed in due course before any of them had notice of any adverse claim of the insurance company, and in reliance upon the finality of the judgment. It is admitted they were all innocent of legal or moral blame. No facts justifying them in refusing to accept the funds coming to them from the law judgment are even suggested. These admitted circumstances show the applicability of the decision of this Court in the Holley case.

In Merchants' Insurance Company vs. Abbott, 131 Mass., 397, the endeavor of the complainant was to require the assured and innocent assignees of portions of certain fire policies to refund the payment by the insurance company of the amount claimed on the policies, on the ground that the insured had induced it to pay off the policies by fraud and mistake. At the trial it was proved that the insured had instigated the burning of his property, in order that he might collect the insurance thereon, and that his proofs of loss were false and fraudulent. *It was admitted, however, that the assignees, who had received a portion of the funds apparently due on the policies, were ignorant of the fraud, and innocent of all participation therein, though it was shown that the transfer of the policies to them was made upon account of antecedent indebtedness due them by insured.* Mr Justice Gray, after stating that the insurance company had all necessary recourse against the insured for his fraud, denies its recourse against the inno-

cent assignees, who participated in the settlement, announcing the following principles, pertinent to this suit:

"There can be no doubt of the liability of Abbott in this action. If the money had been paid by the plaintiffs to him, it could be recovered back as money paid under the influence of a mistake betwen them, and him as to the existence of a state of facts that would entitle him to the money. Although Abbott had not, in fact, received the money, the payment of the money by the plaintiffs at his request, in discharge of his debt to the other defendants, is equivalent to the receipt by Abbott of so much money, and is sufficient to enable the plaintiffs to maintain the action against him upon the special count, if not upon the general count, for money had and received."

"As to the other defendants (the assignees), a different question is presented. If before receiving the money from the plaintiffs, they had known the true state of facts, and had participated in Abbott's fraud, they would have been liable to refund the money; but the report states that there was no evidence of fraud, nor was it contended at the trial that they had any knowledge of the fraudulent conduct of Abbott, but it was conceded that they were wholly innocent parties.

"As to them, therefore, the case stands thus: They held a valid debt against Abbott, the assignment by Abbott to them was made in consideration of that debt and to secure the payment thereof, the previous existence of the debt does not make the assignment the less a conveyance for value. There is no question of the validity or the genuineness of the assignment. Having been made after the fire and after the amount of the loss had been adjusted between the plaintiffs and Abbott, it was in legal effect an assignment of the claim of Abbott upon the plaintiffs for a certain sum of money. That claim not being negotiable in form, could not have been sued by these defendants, except in Abbott's name, and subject to any defenses which these plaintiffs had against him, but the plaintiffs, at Abbott's request and without any suit, paid the amount of the loss, as adjusted between themselves and Abbott, di-

rectly to these defendants, who were wholly ignorant and innocent of the fraud of Abbott.

"As between the plaintiffs and these defendants, there was no fraud, concealment or mistake. These defendants had the right to receive from Abbott the sum which was paid to them. The assignment which they presented to the plaintiffs was genuine, and was all that it purported to be. They hold money honestly, for value, with the right to retain it as their own under the title derived from Abbott, independent of the fraud practiced by him upon the plaintiffs.

"The case stands just as if the money had been paid by the plaintiffs to Abbott, and by Abbott to these defendants, in which case there could be no doubt that while plaintiffs could recover back the amount from Abbott, neither Abbott nor the plaintiffs could recover the amount from these defendants."

In the case at bar, Mr. Clark is the assignee for value before suit filed and without notice, of an interest in Mrs. Mettler's demand against the insurance company, based on the Hunter policies. After failing to prove that Hunter was not dead, the insurance company voluntarily paid Mrs. Smythe the amount of the demand. Mrs. Smythe, through Mr. Finks, paid Mr. Clark his portion thereof, after first, by direction of Clark, paying out of his interest the demands of the other appellees herein; and it is admitted that they were at all times innocent. The parallel with the Abbott case is perfect. If the trial Court was correct in annulling the law judgment, the case then stood unembarrassed by the judgment, and the present appellees stood in an attitude at least as favorable as that of the assignees in the Abbott case.

Glover vs. Coit, 36 Texas Civil Appeals, 104: In a proceeding to probate a will, opposition was lodged on the ground that its execution had been obtained by fraud and artifice, and that the testator was insane. After a contest the probate was allowed. Thereafter, the legatee under the will, in con-

sideration of services rendered to her by her attorneys in the probate matter, conveyed to them an interest in the property affected by the probate of the will. Afterwards, fuller proof was obtained as to the fraud inducing the execution of the will, and the original contestants in the probate proceedings applied to the Appellate Court for *certiorari*, and also brought suit to remove as cloud upon the title which contestants would have to the property, upon vacating the will, the alleged title of the attorneys, the claim being made that they took with notice, because: (1) They were attorneys for the proponent of the will; and (2) The contestants had by their pleadings alleged the fraudulent execution of the will. The Court say, in upholding the *bona fides* of the purchase by the attorneys of an interest in the estate:

> "The will of James T. Coit had been probated and judgment entered in the County Court establishing the same as his last will and testament, and such judgment was in full force at the time, appellees purchased the property. This judgment was rendered in a Court of competent jurisdiction, as a judgment in *rem* and binding upon the heirs of James T. Coit, deceased, and all other persons, until revoked or set aside. * * * Having bought the land sued for while the judgment admitting Coit's will to probate was in force, their (the attorney's) title could not be affected by proceedings subsequently instituted, and resulting in the reversal of said judgment, and annulling said will, if they were purchasers in good faith for value. That they were such purchasers is well established. The judgment of the County Court, admitting the will be probate, as long as it remained in force, was conclusive of its correctness and the validity of the will. * * *
>
> "At the time they (the attorneys) purchased, the will had been admitted to probate, and its validity established by the judgment of the County Court. This judgment embraced the finding, that the charges of fraud and deceit on the part of the devisee to procure the execution of the

will, urged by the contestants in the County Court to defeat the probate of same, were not sustained, and such judgment was conclusive thereof, so long as it remained in force. They had the same right to rely on the conclusiveness of said judgment respecting said matters alleged by the contestants as other persons."

The facts here show that the claim of the insurance company that Hunter was alive, and that Mrs. Mettler was guilty of fraud, were settled by the judgment of this Court adverse to such contentions, before the insurance company paid into the hands of Mr. Finks the amount of the judgment, and that the respondents here obtained none of the company's funds until the alleged duty of inquiry imputed to them had been prosecuted to the very highest source and exploded.

The respondents here are not sued as trustees *ex malificio*, but there is a Texas decision, pointing the distinction between the innocent taker, such as was shown in the Holley case above and here, who disburses the funds which his adversary is endeavoring to trace before notice is given of the adverse claim, and the wrongful taker, who by his transfer puts it out of the power of the real owner to follow the funds.—Schneider vs. Sellers, 98 Texas, 380 (390), and the holding is made in that case that if the title or possession of the holder is obtained in such a way as to charge the funds in his hands with a constructive trust, his transfer of same to an innocent holder will leave him liable to respond to the real owner for the injury done by him in putting it beyond the power of the owner to follow the funds, but it is said in that case, and in the authorities upon which it rests, that wrongful conduct of the party sued is an essential element of his liability, and that without such showing, he cannot be held. See also, 2 Pomeroy's Equity, Section 1051. U. S. vs. Detroit Timber & Lbr. Co. No. 106, Oct. Term, 1905, U. S. Sup. Ct.

II.

There is still another insurmountable obstacle in the way of the attempted recovery in this suit. The right of one who has paid funds under a judgment, or whose property has been sold under its process, to an order for restitution on the reversal or annulment of the judgment, is restricted to parties to the record. As against the adversary party, the Court may act; he is responsible for the suit and the entire proceeds of same, notwithstanding he may have disbursed what he received under the judgment. He may be reached, although he may have paid his attorney, his physician, or his butcher out of the proceeds. His original taking was wrongful, as between himself and his opponent, and the Court moves because of the original wrong, not because of after events. However, when a party lawfully receives the funds, his lawful act cannot without his fault become converted into a wrongful taking. The legal or moral quality of an executed transaction can not be magically metamorphosed by subsequent events. Where the funds have become once lawfully titled in an outsider, the party injured cannot follow them, and by his action make illegal that which had a lawful inception.

Winston vs. Masterson, 87 Tex., 200;
McDonald vs. Napier, 14 Ga., 89;
Little vs. Bunce, 7 N. H., 485;
Wright vs. Aldrich, 60 N. H., 161;
Florida Railway Co. vs. Bisbee, 18 Fla., 66;
Kalmbach vs. Foote, 49 N. W. Rep., 132;
Gray vs. Alexander, 7 Humph., 16;
Wright vs. Aldrich, 60 N. H., 485;
Costigan vs. Newlands, 12 Barlows' 456;
Butcher v. Henning, 35 N. Y. Supp., 1006.

III.

The complainant has proceeded throughout in the prosecution of this suit upon the theory that it was coerced into

paying off the Hunter policies. The contrary, however, is established. Any funds which it has disbursed were in a legal sense voluntarily paid. Manifestly, there was no compulsion operating upon that impalpable something known as the corporation itself, and the record is silent as to any duress of any of its officers. There is not shown even duress of property or even imminent risk of loss in that direction. It is true the judgment of this Court had determined the action at law, but that judgment was neither actually executed, nor even in a fair way for immediate execution. No mandate had issued from this Court, no execution or other process from the trial Court. The record is silent as to any funds or property of the complainant within the reach of the Circuit Court, even if process had issued. If it believed Hunter was living, and if it desired to be put in the position of making an involuntary payment, it could easily have taken the time allowed it by law for the prosecution of its search. Waiving, however, all delay, and the benefit of all means for staying the enforcement of the judgment, it speeds its funds to discharge the same voluntarily. Being a voluntary payment, made not under duress, nor under mistake of law or fact, it could not prevail in this proceeding, even if the equities of these respondents did not so greatly preponderate.

Gould vs. McFall, 118 Pa. St., 455;
Dickerson vs. Lord, 21 Ia., 338;
McDonald vs. Napier, 14 Ga., 89;
Kalmbach vs. Foote, 49 N. W. R. (Mich.), 132;
Butcher vs. Henning, 35 N. Y. Supp., 1006;
Radich vs. Hutchins, 95 U. S., 210;
Elston vs. Chicago, 40 Ill., 514;
Groves vs. Sentell, 66 Fed. Rep., 179.

IV.

The Phillips Investment Company, besides being in a posi-

tion to avail itself of all the equities attaching to the position of Mr. Clark, has an independent equity, not shared by the other parties respondent. The facts sustaining this independent equity have been already stated. They are grouped, elaborated and set out with accuracy and detail in the answer filed by the investment company, which has been set out in full in the preceding pages of this brief. Briefly stated, its position is, that it had an enforceable legal demand against Mr. Clark, upon which the hypothecation contract with it was based; that the Clerk of the Court, disbursing Mrs. . mythe's funds under the direction of Mr. Clark, required it to surrender this demand and allow it to be cancelled. That it did cancel the same and surrender it to the Clerk, and that it did so in reliance upon the faith of the judgment at law, and having neither notice nor suspicion of any irregularity in the same. That it cannot now be restored to its former position, and the pleader presents no such case as would require it after it has cancelled and surrendered its debt against Mr. Clark, to surrender now to the complainant the funds which paid off such demand. It is fundamental that equity will not move against an innocent party, when he cannot be restored to the position which he held before action taken in reliance upon an apparent state of facts, caused or at least permitted by the complaining party. If it would have equity, it must do equity.

. The complainant persists in stating its position, as involving the rules applicable to the assignment of choses in action and judgments, but, as we think, we have demonstrated, it is really seeking to follow property of the highest negotiability, to-wit: Money. The claims of these respondents have been settled and money was the medium of settlement. The transfer of interests in the cause of action did not satisfy their demands, but money satisfied them. There has been a payment and the complainant seeks to reopen the payment, and

recover, not the judgment which has been discharged, but money that has been paid in the transaction.

People's Bank vs. Bates, 120 U. S., 556; (In this case payment was made with negotiable paper, which is property possessing a lower degree of negotiability even than money).

Youngs vs. Lee, 12 N. Y., 551;

Meades vs. Bank, 25 N. Y., 143;

Padgett vs. Lawrence, 10 Paige, 170;

Struthers vs. Kendall, 47 Pa. St., 214;

Goodman vs. Simon, 20 Howard, 343.

GENERAL OBSERVATIONS.

The position of these respondents may be summed up as follows:

Being sworn attorneys of the Courts of the country, they are employed to institute and prosecute a demand, evidently valid, for monies due the beneficiary under certain life insurance policies; it appearing, whether truly or falsely, that the claim is a fair one, and the position of the debtor unjustifiable. By means of these representations they are induced to expend valuable services in reliance upon the truth of the representations made. After a three years' contest over the matter, they recover judgment for their client in Courts equipped for arriving at concrete justice. The unsuccessful debtor, finally convinced that it has causelessly contested the claim, voluntarily discharges the judgment before process issues, either from this Court or the trial Court. Under powers of attorney from the client, the attorneys' fees are paid, the balance going in due course to the client. The attorneys receive the money innocently, still believing in the integrity of their client, relying upon the affirmation of her case evidenced by the solemn adjudication of the Courts, and believing the money to be their own, innocently disburse it

without notice or even suspicion of any defect in their title to it.

If, under this state of facts, the client's case is fraudulent, all parties have been deceived—the attorneys as well as the defendant; the defendant has been caused to pay money by reason of this deceit, though it professes it was never deceived; the attorneys have been induced to pay services extending over a period of four years, and expended in the belief that the story told was true. Notwithstanding there exists no privity between the insurance company, which claims it is defrauded, and the respondents, who occupy the same position if the claim is true, the former seeks to compel the latter to make good its loss, and indulges in a moral disquisition about the iniquitous nature of fraud in general, when these innocent distributees assert their unquestioned equities.

The admission is freely made, that if the facts alleged in the bill are true, Mrs. Smythe is without justification from the standpoint of morals; but no grounds are shown for transferring the loss which now rests upon the insurance company, to the innocent respondents, who are being pursued in this proceeding. The injured party must seek redress at the hands of the author of the wrongs suffered, and ought not to bring before the Courts and subject to the expense and annoyance of litigation parties in no sense responsible for its loss.

Believing the case to be one in which the trial Court, after a full and fair hearing, has done justice, we respectfully pray the affirmance of its judgment.

Respectfully submitted,

W. M. ALEXANDER,
LAUCH McLAURIN,
GEORGE THOMPSON,
F. M. ETHERIDGE,
RHODES S. BAKER,
Solicitors for Appellees.

APPENDIX.

Appellants' brief, pp. 18-23, former appeal.

The Court erred in not charging the jury to find a verdict in favor of the defendant because of the failure to offer sufficient evidence from which an inference of Hunter's death could be drawn.

We might not find it necessary to deny, in the case of a man having no motive to disappear, that a jury might be allowed to find the fact of his death from a long-continued disappearance, under circumstances tending to establish the fact of imminent peril at a prior time.

In the present case, however, policies of insurance were taken out by a person with no visible means of support, which obliged him to pay $200 per annum. These policies were made payable to a sister, who did not appear to be dependent upon him. Within about thirty-five days after their delivery to him, he disappeared. There was a very apparent motive for the disappearance; for, if, without actual death, it would be accepted as an equivalent therefor, his sister, possibly he, would profit to the extent of $15,000.

The error in the proceedings in the court below consisted in the trial judge allowing the jury, despite the obvious motive to disappear, to infer death from the fact of disappearance, without calling their attention to the fact that it was quite as likely to have resulted from a desire to obtain the insurance money, as from actual death.

Would the circumstances connected with the camping at the river, the abandonment of the camp and the footmarks, have been sufficient to establish death?

If not, did the continued subsequent non-appearance for several years, where there was a motive to appear, supply any corroborative evidence?

Undoubtedly there had been an abandonment of the camp. If Hunter desired to disappear, there would have been such abandonment. The footmarks near the river, what was supposed to be an indication that a foot had slipped, and a broken mesquite root, were utterly inadequate to establish the fact of drowning, above all in a river as shallow as was the Pecos.

If Hunter had entered into a plot to collect from the defendant, through an insurance upon his life, the sum of $15,000, *by disappearing, he would have done precisely what was done in the present case.*

In no way were the jury warned of the danger of drawing a wrong inference from the facts presented because of the existence of a motive to give a false presentation and color.

All the points presented to the learned trial judge by the defendant tending to elicit such warning were refused.

He was asked (Rec. p. 33), to charge:

> "If you believe from the evidence that William A. Hunter, Jr., has been seen or heard from, by any one, at any time since his disappearance, you will find for the defendant."

This point was refused because, as he told the jury, he had covered the same in his general charge. Testimony had been given by two witnesses, Wallace and Littler, that each had seen Hunter, identified by photographs, alive, after the alleged disappearance, one at one place and the other at another, far distant. In the general charge, the learned trial judge said (Rec. p. 117):

> "The evidence of witnesses is also before you tending to show that William A. Hunter has been seen on two occasions and at two places since the date of his alleged disappearance on December 4, 1896. You should carefully consider this evidence in relation to his having been seen since the date of his alleged disappearance, and if you believe from the evidence that he was seen by the witnesses who have testified to this, then, of course, it would be your duty to find for the defendant."

There can be no doubt that the defendant was entitled to an affirmance of its point, viz., that if Hunter had been seen or heard from by any one, the verdict should be in its favor. The only justification of a refusal of the point was that it had been charged, in substance, at least, elsewhere.

In the general charge, however, the jury had been instructed that they should find for the defendant, only if they believed he had been seen by the witnesses who had testified to that fact. Two witnesses having so testified, they were practically told that if they believed one had seen him and the other had not, their verdict should not be for the defendant.

The learned judge also refused (Rec., pp. 34, 118), another point in these words:

> "The fact that it is possible or probable that the absent party was at a time and place subsequent to and different from that at which he was last seen in a place where an accident might have befallen him, will not authorize or warrant the indulgence in a presumption concerning his death. The law requires greater certainty and more satisfactory evidence of death. Therefore, unless the jury believe from the evidence that William A. Hunter, Jr., when last seen was in a position of peril, such as that it is more probable that he then and there lost his life than that he extricated himself from such perilous position alive, you must find for the defendant."

Was not the defnedant entitled to have the jury told it was not sufficient to ground a presumption of death, to show that the absent party had been last seen at a place where an accident might have befallen him, but that the law required greater certainty and more satisfactory evidence, of death?

If, where last seen, Hunter was in a position of peril such as made it more probable that he had extricated himself than that he had lost his life, there was no presumption he then and there died. The jury ought to have been told, that under such circumstances, they should not draw such a presumption.

Again. The learned trial judge (Rec., pp. 34, 117), was asked to charge:

"The law presumes that the life of any person continues for seven years after the last time he was seen alive or heard from. The death of a person may be established by circumstantial evidence, but in such cases the circumstances proven must exclude, to a reasonable and moral certainty, the fact that such person is still living,a nd each fact in the chain of facts from which the death of the party is to be inferred must be proved by competent evidence and by the same weight and force of evidence as if each one were the main fact at issue, and all the facts proven must be consistent with each other and consistent with the main facts in issue—that is, the death of the party. Unless, therefore, the plaintiff has established the death of William A. Hunter, Jr., by the certainty hereinbefore set forth, the jury should find for the defendant."

Was not the defendant entitled to demand proof of circumstances such as excluded a reasonable and moral certainty that Hunter was still living?

If shown, when last heard from, to have been in a position of peril not such as to exclude a reasonable and moral doubt that the peril resulted in his death, was the fact of his death established?

The learned trial judge (Rec., pp. 32, 117), charged thus:

"If from the evidence in this case you should come to the conclusion that Hunter has been continuously absent since December 3d, 1896, without being heard from by his relatives and friends, it should have due weight with you in arriving at your verdict. * * * Absence alone cannot establsh the death of Hunter, for the law presumes an individual shown to be alive and in health at the time of his disappearance continues to live. Whle the death of Hupnter s not to be presumed from absence alone, yet it is a circumstance which should be taken into consideration with all the other evidence in the case and the conclusion of life or death arrived at from all the facts and circumstances, including his continued absence."

We submit that this portion of the charge was inadequate, because it failed to call the atention of the jury to the fact that a motive existed for Hunter's continued absence. The nonappearance of a person having no motive to disappear, may lend corroboration to circumstances tending to prove a prior death. Such non-appearance, however, where there is such motive, affords no corroboration whatever of anything other than of a desire to materialize the motive into money.

CHARGE OF THE COURT.

"Gentlemen of the Jury: The plantiff, Jennie M. Mettler, sues the defendant, the Fidelity Mutual Life Association of Philadelphia, to recover on three policies of insurance of $5,000 each, which policies of insurance were taken out by William A. Hunter on his life. The plaintif is named as beneficiary in each of these policies of insurance.

"The plaintiff also sues to recover of the defendant association 12 per cent damages on the amount of her loss, to-wit, $15,000.00 and interest theron, together with all reasonable attorneys' fees incurred in the prosecution and collection of her claim against the defendant association. She seeks to recover 12 per cent damages and attorneys fees above mentioned under and by virtue of a statute of the State of Texas, allowing same in certain cases.

"William A. Hunter, the insured, had a right in law to insure his life in facor of his sister, Mrs. Mettler.

"It is shown by the three policies of insurance and the receipts for the premiums paid thereon, which are in evidence, that the insurance policies became effective on the 31st day of October, 1896, and continued in effect up to the 20th day of April, 1897—the premiums on the policies having been paid to that date.

"It is alleged that the insured, William A. Hunter, died on or about the 4th day of December, 1896, so that the insurance under those policies was effective at the time the insured is alleged to have died.

"In order for the plaintiff to recover in this action, it

is necessary for her to prove by a preponderance of the evidence, that her brother, William A. Hunter, is dead, and that he came to his death on or about the 4th day of December, A. D. 1896, and within the terms during which the policies of insurance ran and were effective.

"While death may be presumed from the absence, for seven years, of one not heard from where news from, if living, would probably have been had, yet this period of seven years, during which the presumption of continued life ceases, may be shortened by proof of such facts and circumstances connected with the disappearance of the person whose life is the subject of inquiry, and circumstances connected with his habits and customs of life as submited to the test of reason and experience, would show to your satisfaction by a preponderance of the evidence, that the person was dead.

"By 'proof to your satisfaction,' as applied in this case, is meant that when you come to weigh and balance the evidence as to the probability of Hunter's being alive or dead, your mind shall arrive at the conclusion of his death. The law is satisfied with less than a certainty, yet requires a preponderance of proof establishing the fact of his death. Death, like any other fact, can be shown by circumstantial evidence, reasonably showing that according to human experience, it is more probable that the person is dead than that he is alive.

"If from the evidence in this case you shall come to the conclusion that Hunter has been continually absent since December 3, 1896, without being heard from by his relatives and friends, it should have due weight with you in arriving at your verdict. Reputation in his family on the part of his father, sisters and brothers of his death is proper evidence for your consideration, but not the opinion of anyone, and in considering the reputation which exists in his family you should consider the facts and circumstances upon which the reputation of death is founded. You should also consider the failure, if there has been a failure, of those most likely to hear from him to get any news or learn of his whereabouts since the date of his alleged disappearance, December 3, 1896. You should also

take into consideration the evidence as to Hunter's character, disposition, habits, domestic relations, circumstances of life, declarations and the immediate facts and circumstances surrounding his disappearance.

"Absence alone cannot establish the death of Hunter, for the law presumes an individual shown to have been alive and in health at the time of his disappearance, continues to live. While the death of Hunter is not to be presumed from absence alone, it is yet a circumstance that should be taken into consideration, with all the other evidence in the case, and the conclusion of life or death arrived at from all the facts and circumstances, including his continued absence.

"Much evidence has been introduced before you in relation to the starting of Hunter from Pecos to Mentone. You have heard in great detail the circumstances surrounding the finding of the outfit with which Hunter started on his trip from Pecos to Mentone at a point on the bank of the Pecos river, and the conditions which existed at that place. It is the theory of the plaintiff that Hunter came to his death by drowning in the Pecos River near the point where his wagon and outfit were found. You should carefully consider and weigh all the facts and circumstances which have been detailed before you in relation to the finding of his wagon and evidence in the case, in reaching your conclusion as to whether or not Hunter met his death at the time and in the manner alleged by plaintiff.

"If you come to the conclusion that Hunter met his death at or about the time alleged in plaintiff's petition as the date of his death, and in the manner therein named, to-wit: by being drowned in the Pecos River, it would be your duty to find for the plaintiff.

"It is the theory of the defendant that William A. Hunter did come to his death at the time and in the manner contended by plaintiff. Evidence of circumstances relating to his disappearance and of the condition of things found at his camp on the bank of the Pecos River have been introduced before you in support of the theory of the defendant. The evidence of witnesses is also before you

tending to show that William A. Hunter has been seen on two occasions and at two places since the date of his alleged disappearance on December 4, 1896. You should carefully consider this evidence in relation to his having been seen since the date of his alleged disappearance, and if you believe from the evidence that he was seen by witnesses who have testified to this, then of course, it would be your duty to find for the defendant.

"You are exclusive judges of the credibility of the witnesses, of the weight of the evidence, and of the facts proven, but you will be controlled as to the law of the case by the charge of the court.

"If, under the foregoing charge, you should find for the plaintiff, you should estimate her damages at the face value of the policies, which is $15,000.00, together with 6 per cent interest thereon from December 2, 1897, which is the date on which suit was instituted in the State Court down to this date, June 2, 1900; and also 12 per cent on the total of the face of the policies and interest, as damages, and you should also find for her reasonable attorneys' fees for the prosecution and collection of her loss, and your verdict should separate the amounts found as principal, as interest and as damages, and the amount found as reasonable attorneys fees.

"In event you should find for the plaintiff, I give you for your assitance, a form for your verdict:

"'We, the jury, find for the plaintiff, and assess her damages as follows:

"'15,000.00 as principal;

"'.....as interest at the rate of 6 per cent. from December 2, 1897, to June 2, 1900;

"'$..... the sum being 12 per cent damages on the amount of $15,000.00 and interest thereon at 6 per cent.

"'$..... as reasonable attorneys' fees.'

"If under the foregoing charge your verdict should be for the defendant, you will simply say:

"'We the jury find for the defendant.'

"(Signed) Edward R. Meek, Judge."

(Rec. pp. 491-493.)

REQUESTED CHARGES.

"You are instructed to find for defendant."

"Plaintiff is not entitled to recover attorneys fees or penalty, even if you should, under other instructions given, find that plaintiff is entitled to recover on the policies."

"The law presumes that the life of any person continues for seven years after the last date he was seen alive or heard from.

"The death of a person may be established by circumstantial evidence, but in such cases the circumstances proven must exclude to a reasonable and moral certainty the fact that such person is still living, and each fact in the chain of facts, from which the death of the party is to be inferred, must be proved by competent evidence, and by the same weight and force of evidence as if each one were the main facts in isue; and all the facts proved must be consistent with each other and consistent with the main facts in issue, that is, the death of the party. Unless, therefore, the plaintiff has established the death of William A. Hunter, Jr., by a certainty hereinbefore set forth, the jury should find for the defendant."

"If you believe from the evidence that William A. Hunter, Jr., has been seen or heard from by any one at any time since his disappearance, you will find for the defendant."

"The fact that it was possible or probable that the absent party was, at a time and place subsequent to and different from that at which he was last seen, in a place where an accident might have befallen him, will not authorize or warrant the indulgence in a presumption concerning his death. The law requires greater certainty and more satisfactory evidence of death.

"Therefore, unless the jury believe from the evidence that W. A. Hunter, Jr., when last seen was in a position of peril, such as that it is more probable that he then and there lost his life, than that he extricated himself from such perilous position alive, you must find for the defendant."

"A warranty is a stipulation in writing in the policy, or

a condition thereon endorsed on the truth of fulfillment of which the entire contract depends. Such stipulation may be on the face, margin or back of the policy, and whether it be material to the risk is not a question for the jury to consider.

"Therefore the jury must believe from the evidence that W. A. Hunter, Jr., at the time of making application for insurance to defendant, on which policies of insurance were issued, and are herein involved, was at the time he made such application, both a farmer and a real estate agent, and unles you so believe, you will find for the defendant." (Rec., pp. 488, 489, 490.)